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Regulating Televised News: A New Season for the Public Interest Standard

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NOTES

REGULATING TELEVISED NEWS: A NEW SEASON FOR THE PUBLIC INTEREST STANDARD

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Televised news is not what it used to be. It bombards. Alerts flash; tickers scroll; well-coiffed men with square jaws point fingers and bark trademarked slogans. Women in short skirts deliver headlines; animated advertisements for upcoming interviews or debates thunder to music. With a click of the remote control, a cable or satellite subscriber may scroll through a handful of channels of this new breed of news at any hour of the day. Only a few news programs soldier on with gray studio panels, gray hosts.

The news media, in general, is in a deep time of change.[1] This Note will address one particular trend in televised

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1. *See* Project for Excellence in Journalism and the Committee of Concerned Journalists, *The State of News Media 2004: An Annual Report on American Journalism*, *at* http://www.stateofthenewsmedia.org/2004 (last visited Apr. 9, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter PEJ]. The PEJ found that "journalism is in the middle of an epochal transformation, as momentous as probably the invention of the telegraph or television." *Id.* at 4. The report notes eight "overarching trends": (1) A growing number of news outlets are chasing a relatively static or even shrinking audience for news; (2) Much of the new investment in journalism today—much of the information revolution generally—is in disseminating the news, not in collecting; (3) In many parts of the news media, we are increasingly getting the raw elements of news as the end product ("This is particularly true in the 24-hour media"); (4) Journalistic standards now vary even inside a single news organization; (5) Without investing in building new audiences, the long term scenario for many traditional news outlets seems problematic; (6) Convergence of media (Internet, newspaper, television) seems more inevitable and potentially less threatening to journalists than it may have seemed a few years ago; (7) The biggest question mark may not be technological but economic (e.g., If Internet news does not prove profitable, will this lead to cutbacks in

news.[2] This trend is characterized by a commercialized blend of (1) news reporting, (2) editorial programs, i.e. opinion-based programs on news topics, and (3) advertising by news networks of news items and their own editorial programs. I will refer to this trend as the "news/ed/ad mixture." The trend toward a news/ed/ad mixture is exemplified in the programming of cable news outlets such as Fox News, MSNBC, and CNN. These networks mix news reporting with editorial programs hosted by strong personalities such as Bill O'Reilly, while aggressively advertising their own news and editorial products. Broadcast networks CBS, ABC, NBC, and PBS, confronted with competition from cable networks, must contemplate whether they will follow the same trend.

The trend toward the news/ed/ad mixture in televised news has worrisome consequences. Paradoxically, as the number of news channels available to the public increases, the scope of news issues covered may narrow. The popularity and comparative inexpense of editorial programs reduces the incentive for news networks to put resources into newsgathering and responsible journalistic treatment of a wide range of news issues. The marketing of the coverage of news items and of editorial programming provides abundant opportunities to attract viewers to a particular "approach" to news (e.g., "Fair and Balanced"), but advertising for news and editorial content often has the effect of reinforcing a small set of popular news stories, rather than broadening exposure of the public to newsworthy issues. At its most worrisome, advertising of editorial and news programming promotes partisanship. Viewers develop loyalty to a particular news

newsgathering?); (8) Those who would manipulate the press and public appear to be gaining leverage over the journalists who cover them (e.g., a "seller's market" for information). *Id.* at 5–7. I do not attempt to address all of these issues. I address themes found in trends (2)–(4) and (7), namely, the shift of resources from news gathering to dissemination of news, uncertain journalistic standards for "news," and market constraints on newsgathering.

2. By "televised news," I mean to include both news broadcast over the airwaves and news delivered by cable and satellite media to general consumers via television or similar device (unless otherwise specified). The "news" problem on which I am focused is the effort of companies, whether public or private, through television and for at-large viewers, to provide images, information, opinions, and/or forums about public matters (particularly political, social, legal, business, and non-technical scientific matters). In shorthand, "televised news" is the televised form of what has traditionally been called "the press" by citizens, the media industry, and the First Amendment. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

outlet because it presents the news largely from a single ideological viewpoint. When news becomes partisan, both networks and viewers lose interest in problems and points of view that challenge moral and policy commitments. We all lose the opportunity to benefit from the creative use of resources and talents that can be invigorated by a well and widely informed public.

The purpose of this Note is to address whether it is good policy for the federal government to regulate televised news—for content—in response to the trend toward the news/ed/ad mixture. The goal of such regulation would be to ensure that the public has access to news through the televised medium that is sufficiently wide in scope of issues important to a democratic public. If so, the task falls to the Federal Communications Commission ("FCC"), to which Congress has delegated the authority to grant television and radio licenses according to whether licensees promote "the public interest, convenience and necessity."[3]

FCC regulation of the content of televised news is the best option available if we want to preserve televised news as a medium that promotes a just, democratic society. The public's choice is between government content regulation, with the ever-present risk of government censorship, or the risk of the private managerial censorship of new outlets. Without reasonable, government-enforced standards for minimal news content, there is a risk that managerially censored news will descend into a Roman circus, a popular public forum where small pieces of important news are lost in a forum for appetite and entertainment, to the neglect of serious affairs of state, the marginalized, and suffering.[4]

In Part I, I describe, in non-legal terms, the problems with the current trend in televised news, and why televised news

3. Communications Act of 1934, §§ 307, 309, 47 U.S.C. §§ 307, 309 (2000).

4. Without mass media, the Roman Empire had few occasions to address the general public all at once. At the circus, between chariot races the Emperor would announce new laws to a public that usually could not read them for themselves. Inside the circus, the Emperor would exercise unusual indulgence. As an understood rule, the public, often drunk and rowdy, could denounce the Emperor, other officials, or policies with the most scathing and scandalous of rebukes; such behavior outside the circus would be punishable. The ancient Roman historian Dio outlined a typical episode in 196 A.D.:

> The populace, however, could not restrain itself, but indulged in the most open lamentations. . . . [T]hey shouted: "How long are we to suffer such things?" and "How long are we to be waging war?" And after making some other remarks of this kind, they finally shouted, "So much for that," and turned their attention to the horse race.

ROBERT B. KEBRIC, THE ROMAN PEOPLE 233–37 (1993).

should be regulated by the government. In Part II, I address how the FCC should regulate televised news and offer two proposals. The case for FCC's use of these proposals involves three parts. First, I argue that the FCC needs to move away from the scarcity rationale for regulation and adopt a "special impact" theory. Second, I show that my two proposals have precedent in FCC doctrine prior to 1980s deregulation. Third, I outline several ways in which the risk of government censorship through programming content regulation can be avoided.

Behind my interest in such FCC regulation is a confessedly moral goal. I would like to see news networks challenged to fulfill their public interest obligations because televised news has the power to improve the quality of many lives. Televised news—unlike any other source—can inform and move the public. The array of resources and talents among members of the public who learn of issues can be put to use in solving problems. Many long-range, systematic problems of the poor and suffering, of government corruption and abuse, of health and disease, and of environmental destruction are underreported. Consequently, talents and resources that may be committed to these problems are lost.

Reasonable people can differ on what is most important to be included in news coverage. These differences should not lead us to neglect the content and quality of reporting. The opportunity to promote any standards at all in televised news coverage is quickly slipping away. With digital technology, there is a shift from broadcast to cable and satellite. Thus far, the FCC has not countered this shift with new regulations. The FCC has preferred to let "markets decide," and the markets have embraced many elements of the news/ed/ad mixture. Harnessed and guided by reasonable content standards, televised news networks will improve the quality of news coverage and serve the public interest, rather than minimize and trivialize news coverage as they devour one another in market competition for advertising revenues.

I. WHY TELEVISED NEWS NEEDS TO BE REGULATED

The heart of this Note is analysis of the FCC's authority to engage in content regulation of televised news, and why it is good policy to do so. Before moving to this analysis, however, I will describe the televised news problem in non-legal terms, in order to make the case that the problem justifies such regulation.

A. *Televised News Is Powerful*

Especially in times of crisis, the power of news networks to bring vivid pictures, sounds, stories, and engaging people to the public in short amounts of time is stronger than any other kind of medium. The government relies on televised news. The public relies on televised news. Consider the months following September 11, 2001. Televised news was a galvanizing force. News reporters became household figures. Televised news played a large part in writing the story, as through it Americans shared images, stories, and personalities.

Americans do, of course, consult news media other than televised news. We go to newspapers, magazines, radio, and increasingly, online sources.[5] But, given current technology, none of these other news media possess the same galvanizing properties as televised news. As Owen Fiss has argued, television is the "paramount public medium" because of its "unique capacity to create a shared understanding."[6] Fiss contrasts, for example, television and the Internet:

> [Television] defines the public. Computerized communication is private in the sense that citizens use computers to pursue individually what interests them and also to communicate individually with those they already know or want to know. With television, on the other hand, millions and millions of families watch the same show or the same news broadcast, often at the same time. For instance, every week more than ten million households watch the program *60 Minutes*, and more than forty million households tuned in for the final episode of Seinfeld. Television is unique in its capacity to produce this type of shared experience and for that very reason can be regarded, at least today, as the paramount public medium.[7]

The comparison with newspapers or magazines would lead to similar conclusions. While newspapers or magazines are arranged to emphasize certain news issues, one is still at liberty to

5. In 2004, most Americans "regularly" watched local news (59%), read newspapers (42%), watched network evening news (34%) and network magazine news (22%), watched ESPN (20%), read Time/Newsweek/US News (13%), listened to National Public Radio (16%), or watched NewsHour (5%). PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, ONLINE NEWS AUDIENCE LARGER, MORE DIVERSE 3 (2004), *at* http://people-press.org/reports/pdf/215.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Pew Study].

6. Owen M. Fiss, *The Censorship of Television*, 93 N.W. U. L. REV. 1215, 1217 (1999).

7. *Id.*

flip through pages. One can turn away from television or click it off, but an engaged viewer is shaped by its content in a unique manner. One shares immediately with millions of others in watching a televised news program. Only radio comes close in power, but it lacks the powerful and persuasive capacity to bring pictures.[8]

The increase in television channels or online sources is unlikely to disperse this galvanizing effect of television news. As Fiss notes, even as large numbers of channels become available to many viewers through cable or satellite, "the costs of gathering news and producing programs will ensure that a relatively small number of channels will dominate the spectrum. These channels will remain the principal institutions that construct the public agenda and shape public understanding."[9]

Americans spend a lot of time with the news. Seventy-one percent of Americans say that they begin their day with some type of news; over sixty percent watch or listen to news during the dinner hours.[10] Taking into account all major media (newspaper, television, radio, Internet), the average American spends sixty-six minutes per day with the news.[11] Of these, forty-nine minutes are spent on broadcast or cable media (television or radio).[12]

Televised news persuades, though the public believes less of the news than it used to believe. Credibility ratings—reflecting the number of people who respond that they believe "all or most" of what they see and hear on a channel or program—have dropped for every broadcast and cable news outlet except for Fox News since 2002.[13] For 2004, the highest credibility ratings are for CBS' *60 Minutes* (33%), followed by CNN (32%); Fox moved from twenty-five percent to twenty-six percent over the past two years.[14] These ratings are higher than any print media

8. The public has a preference for "viewing" the news over "reading" it, rendering broadcast and cable television particularly important. When asked to choose which way of "getting the news" provides the best understanding of major news events, fifty-five percent of Americans prefer seeing pictures or video footage, compared to forty percent who say they learn more from reading or hearing the facts about what happened. *Id.* at 30.

9. Fiss, *supra* note 6, at 1217.

10. Pew Study, *supra* note 5, at 9–10.

11. *Id.* at 11.

12. *Id.* This figure has been fairly stable over the past decade. As a high, viewers spent an average of seventy-three minutes on news in 1994, and as a low, they spent fifty-eight minutes per day in 2000. *Id.*

13. *Id.* at 40.

14. *Id.* The credibility of *60 Minutes* may fall based on the admission of CBS in December 2004 that a report done on the military service of George W.

(led by *USA Today* at 24%).[15] On the whole, fifty-three percent of the public "agrees" with the statement: "I often don't trust what news organizations are saying."[16] Nine percent "completely disagree" with this statement (i.e., they always trust what is on the news).[17] Combine these credibility ratings with the fact that the average American watches or listens to nearly an hour of broadcast or cable news per day, and the effect is considerable: televised news can bend the ear of the thirty percent of the American population who believe "all or most" of what they hear for nearly an hour a day.

B. *Televised News Is Proprietary: The News/Ed/Ad Mixture*

Televised news is becoming more proprietary. Certainly, news outlets have always been competitive in the sense that they try to "scoop" one another. Today's televised news outlets—led by the cable news channels—fashion proprietary blends of (1) news; (2) editorial opinion shows that feature strong personalities with readily identifiable approaches or opinions on news items (these opinions usually are not an "official" opinion of the news channel, but they are marketed as part of the news product); and (3) advertising of the outlet's news and editorial products, including everything from "Fox News Alerts" to advertisements for *Scarborough Country*. The blend of these three is what I am calling the "news/ed/ad mixture."

Consider Fox News' humorless 2003 lawsuit against comedian Al Franken. Fox sued Franken for trademark infringement.[18] The claims that Fox made in its complaint provided a revealing look into how a cutting-edge contemporary television news company views its products. Fox claimed that its trademarked slogan "Fair and Balanced" is a "unique" and "distinctive" brand of reporting news.[19] The complaint continued by touting the prominence and uniqueness of its top on-air personality, Bill O'Reilly, and the amount of money it has spent ($61

Bush was based on falsified documents. *See CBS Ousts Four Over Guard Story*, CNN, Jan. 17, 2005, *at* http://www.cnn.com/2005/SHOWBIZ/TV/01/10 / cbs.guard (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

15. Pew Study, *supra* note 5, at 40. By comparison, *People* magazine has a seven percent credibility rating and the *Enquirer* five percent. *Id.*

16. *Id.* at 4.

17. *Id.* at 33.

18. Complaint for Plaintiff, Fox News Network v. Penguin Group and Alan Franken, No. 602514/2003 (N.Y. Sup. Ct. filed Aug. 7, 2003), *at* http://news.findlaw.com/hdocs/docs/ip/foxpenguin80703cmp.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

19. *Id.* at ¶ 2.

million since 1998) to promote the "Fair and Balanced" product.[20]

The Fox suit reveals how closely the networks manage their mix of personalities, slogans, and images. Editorial "spin" (or purported lack of it in Fox's slogan for O'Reilly's "No Spin Zone") is in itself a marketable product. This "spin" is brought to the viewer through a mixture of news items blended with editorial opinion and bold and integrated self-promotion.

Fox News has set the pace for the new proprietary news.[21] Since 2000, the number of Americans who watch Fox News regularly has increased from seventeen percent to twenty-five percent, while other networks have been "flat at best."[22] Much of Fox News' success, however, appears attributable to the growing partisanship of its viewers. Fifty-two percent of Fox's viewers describe themselves as "conservative," up from forty percent in 2000.[23] The partisan split in news viewers is strikingly reflected in credibility ratings by political affiliation. In general, Democrats give a much higher credibility rating to broadcast and cable (and print media) than Republicans. Across all of the major broadcast and cable news channels, Democrats give credibility ratings that are anywhere from fourteen to nineteen percent higher than Republicans.[24] The exception is Fox News, to which Republicans give a five percent higher credibility rating than Democrats.[25]

If Fox News signals a trend toward partisanship, this trend may still be in its infancy. When asked, forty-five percent of Americans still view the news media as "pretty much the same to me."[26] Among those with interests in "hard news" (Washington politics, international affairs, and policy news), however, sixty-six percent perceive clear distinctions between networks.[27] Viewers

20. *Id.* at ¶ 23.

21. Pew Study, *supra* note 5, at 3 (leading off its annual report overview by citing the growth of online news and Fox News' growth as an exception to viewer habits that otherwise have remained "stable" over the past two years); *see also* PEJ, *supra* note 1, at 18 ("Ideology aside, the real 'Fox Effect' in cable is a new approach to newsgathering, one that relies more on anchors and talk shows and less on correspondents. Other cable networks have imitated that approach.").

22. Pew Study, *supra* note 5, at 1.

23. *Id.*

24. *Id.* at 40.

25. *Id.*

26. *Id.* at 34.

27. *Id.* The "hard news" audience identifies themselves as viewers or listeners of the O'Reilly Factor, Rush Limbaugh, the NewsHour, news and business magazines, and the Fox News Channel. *Id.*

give almost entirely different lists of "most believable" news sources, depending on political affiliation.[28]

Some commentators have begun to raise the question of whether the striking success of Fox News in boosting ratings among viewers with a particular political affiliation will force other networks to adopt a more partisan format.[29] The increased use of flavorful partisan commentators and slogans has proven effective, and challenged other networks in the full-time news business.

Thus far, its competitors insist that they will chart their own courses, citing a commitment to providing "straight" news, and bucking any trend toward partisan programming.[30] But, it is a

28. Republicans list as most believable, in descending order: Fox News (29%), CNN (26%), *60 Minutes* (25%), Wall Street Journal (23%), C-Span (22%), Local TV (21%); Democrats list: CNN (45%), *60 Minutes* (42%), C-Span (36%), ABC News (34%), CBS News (34%), NPR (33%); Independents: *60 Minutes* (29%), CNN (28%), C-Span (26%), U.S. News (26%), NBC News (24%), NewsHour (24%). *Id.* at 44.

29. *See, e.g.*, Peter Johnson, *Will Fox News' Success Force Competitors to Take Sides?*, USA TODAY, Nov. 21, 2004, *available at* http://www.usatoday.com/ life/ columnist/mediamix/2004-11-21-media-mix_x.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Some critics worry that a partisan turn in the media will lead televised news to abandon the journalistic aspiration to something like "straight" news. Jay Rosen remarks that "the whole political scheme that journalists thought they had settled forever with this past they called 'objectivity' is not working. We don't have a media system that's aligned well with the more partisan political life of the country. The press will have to become more political." *Id.* For more of Jay Rosen's views, posted on his blog, see PressThink: Ghost of Democracy in the Media Machine, *at* http:// journalism.nyu.edu/pubzone/weblogs/pressthink (last visited Feb. 22, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). But, it is not obvious that the public is *more* partisan than it ever has been. It is more likely that the public is responding to a new product. Until recently, no televised news product has been widely available on the market that offers a combination of news, opinion, and advertising that provides viewers with news around the clock, and that reflects—in the tone and content of editorials and advertising—the viewers' own partisan political leanings.

30. *See* Johnson, *supra* note 29. CBS News' news chief Andrew Heyward remarks that Fox "has created an expectation that you can get your news and have the spicy conversation around it. To present straight news against that competitor is potentially problematic." *Id.* Yet, he predicts that the growth of opinion on cable will define a role for mainstream networks as "a repository of straight down-the-middle journalism." *Id.* ABC News President David Westin recently noted that there are "powerful reasons for the embrace we're seeing of opinion journalism on TV . . . . It's vivid. It's entertaining. And let's face it: It's less expensive." *Id.* But, he has also insisted that his network intends to give viewers "more than just opinions. We need to give them solid facts on which to base their opinions on important issues of the day." *Id.* CNN's chief Jim Walton states that "there is no question that opinion and debate can be oftentimes entertaining and create passions in viewers. But I can emphatically state that

caricature of the current televised news market to portray it as a battle between "straight" news providers and their partisan competitors. None of the major televised news outlets have exhibited a desire to return to old-fashioned, shoe-leather journalism. The 24-hour news networks have followed Fox News in adopting proprietary formats for news coverage that is interspersed with programs hosted by "personalities" and propelled by more or less continuous advertising of news coverage and opinion programs.[31]

Televised news, then, is growing ever more proprietary. The televised news market is defined by the news/ed/ad mixture and exhibits some trend toward partisanship. It remains to be seen whether the trend toward partisanship will last. If it does, this limits one of the powerful features of televised news—to present issues to a wide range of viewers in a manner that can begin conversations, continue debates, and promote concerted action to solve problems.

C. *The Televised News/Ed/Ad Mixture Narrows the Scope of News Issue Coverage*

The news/ed/ad mixture narrows the scope of issues the public receives news of through the television medium. Self-advertising allows a news network to craft an image, which it can

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CNN's business is built on being an independent voice. Fortunately for us, good journalism is good business." *Id.* MSNBC head Phil Griffin notes Fox, especially in its talk shows, has a conservative bent, but he adds that his channel does not intend to provide a political alternative to the conservative Fox network. *Id.*

31. CNN focuses on the strength of the "CNN brand of news," which it insists is among the best known and respected among consumer brands of all kinds. *See* Jennifer Pendleton, *Cable News Nets Look For Ad Revenue Payoff: Analyst Take Is that Fox Should See Gains; Retail; DTC Show Promise,* ADVERTISING AGE, June 9, 2003, at S6. CNN, selling itself as "The Most Trusted Name in News," pushes the "hard-news value" of the network, its "upscale audience and its reach." *See* Richard Linnett, *Holding on to Viewers: CNN, Fox, MSNBC Vie to Stand Out in Upfront,* ADVERTISING AGE, May 5, 2003, at 34. Fox pushes hard with a patriotic line and aggressive personalities who bring a "Fair and Balanced" perspective where "We Report, You Decide." MSNBC, co-owned by NBC and Microsoft, sells its cable offerings alongside its leading broadcast news properties while emphasizing the entertainment value of its new prime-time lineup. All three networks depend on pushing high-profile "news personalities." In the spring of 2003, MSNBC was launching programs, "Hardball with Chris Matthews," "Countdown with Keith Olbermann," "Jesse Ventura Live," and "Scarborough Country" with Joe Scarborough. Fox's lineup included: "The O'Reilly Factor," "Hannity & Colmes," "On the Record with Greta Van Susteren," and frequent appearances from Oliver North. CNN presented Paula Zahn, Lou Dobbs, and Larry King. CNN presents itself as being "more news." *Id.*

then sell through stylized half-hour or hour-long editorial programs, such as "The O'Reilly Factor." Choices of news coverage are colored by the need for spicy opinion shows and attractive marketing. What is newsworthy is shaped and refined by repetition.[32] The repeated exposure of news, commentary on news, and advertising of both the news and the commentary assumes the appearance, over time, of common-sense. What is "fair and balanced" shifts, little-by-little, as common-sense shifts.

Advertising of news does much to magnify the impact of televised news, without helping to fulfill duties to inform the public. There are scarcely any good reasons to advertise news items or editorial programs. Often the advertising of news items "cross-advertises" a network's editorial programs that address the same news items, bestowing a gloss of importance on issues that may not be warranted. For example, advertisements urge that it is important to keep current news updates on the most recent sensational celebrity trial, because it will be discussed on several of the opinion programs.

Advertising for editorial programs can, of course, be useful. Some opinion journalists are better than others; it is reasonable that the public might develop a predilection for certain personalities and like to know when they will be on the air and what they will discuss. News outlets have gone too far, however, in the integration of opinion journalists into the presentation of the news. Advertising is a major cause of this over-integration.

News outlets may counter by noting the popularity of editorial formats and infer that the popularity of news formats means that people will watch "more" news. Viewer preferences for news format do not always amount to responsible news reporting. Indeed, many of the techniques employed in the news/ed/ad mixture accord with reported public tastes in news. For example, Fox's "Fair and Balanced" product emphasizes the dynamic of "back-and-forth" debates. The most popular news technique is the presentation of debates between people with diverging points of view.[33] The "back-and-forth" regimen, however, is easily manipulated and it can be misleading. In a market where exposure on television news as an "expert" can boost an individual's career or an institution's reputation, it is not difficult to find contributors who will play parts in small debates. Quick segments

32. PEJ, *supra* note 1, at 18 (reporting that 68% of segments on cable were repetitious accounts of previously reported stories without any new information; only 5% of revisited stories could be called "follow ups" with new facts).

33. Fifty-five percent of viewers "like" this way of presenting the news. *See* Pew Study, *supra* note 5, at 32.

(sometimes as few as two minutes) that give the "back and forth" on issues may appear on their face to be fair or balanced. But, where the questions raised or diversity of participants in debates is limited, news networks may impress upon viewers a vision of public discourse where policy issues are like crosswords puzzles or other short diversions, rather than parts of complex and systematic difficulties (as they often are).

After a strong preference for the "back-and-forth" debate, viewers note that they "like" the news to include "ordinary Americans' views" (49%), that news be "enjoyable and entertaining" (48%), have in-depth interviews (46%) and sometimes be funny (46%).[34] Twelve percent of respondents "disliked" news that stirs their emotions.[35] News coverage that fits these viewer specifications is likely to exclude too much news. Plenty of important news cannot easily be captured by presenting short debates between people with different points of view, by consulting the "ordinary Americans'" views, and making it enjoyable, entertaining, and funny. Many of the problems that afflict the impoverished, uneducated, and powerless may be routinely excluded on the basis of consumer preferences for viewing format. Many long-term or systematic problems do not receive adequate coverage, as they may not be amenable to "back-and-forth" policy debates; they may not be fun or entertaining; they are remote from the understanding of the "ordinary American."

Responding to current public tastes in news format makes it easy for news networks to de-emphasize the more expensive tasks of newsgathering. The retrieval of hard news is expensive and difficult. Only a few networks have the resources to do it well, and the viewing audience benefits more from the fruits of hard newsgathering than it benefits from opinion shows. Editorials remain important. Viewers benefit from insightful, engaging personalities with opinions that illuminate issues. The need for editorial programming, however, is not as compelling as the need for wide news coverage. For those who want opinion, a sea of magazines and blogs are available.

The narrowing of the scope of issues presented through the televised news medium poses distinct harms. Particularly disadvantaged are those who depend on televised news more because they may lack literacy, resources (e.g., libraries, university classes, and computers), or simply enough time to research and reflect on public events. In addition, the narrowing of the scope of issues limits the range of issues by which the general public—

34. *Id.* at 32. Responses included "like," "dislike," or "doesn't matter."
35. *Id.*

filled with individuals and entities who may hear about a variety of issues and stories—may be moved or challenged to use resources and talents to serve the common good. Many of the best things in American democracy begin from the bottom up, and televised news has a crucial role to play in informing individuals and entities who can play a variety of roles in the democratic process.

In order to promote good things from the bottom up, it may be necessary to have limited and judicious intervention from the top down. Televised news, as the "paramount public medium" is uniquely powerful in shaping public agendas. But, through the use of the news/ed/ad mixture, televised news outlets have developed an increasingly proprietary conception of the news. This may have the effect of making the presentation of news partisan. It also has the effect of privileging advertising-amenable and inexpensive editorial programming over the hard tasks of newsgathering. Both of these effects lead to a narrowing of the scope of news issue coverage. This core problem justifies limited and judicious regulation by the federal government. In the balance of this Note, I will sketch the case for how the FCC should address this problem.

II. How Televised News Should Be Regulated

I begin by laying out two proposals that address the problem of the narrowing scope of issue coverage in televised news:

(1) Partition the news/ed/ad mixture. Partitioning involves keeping news reporting as "pure" as possible by obliging news outlets clearly to separate editorial programming from news coverage. It also involves reducing the amount and kind of advertising of news items and of editorial programs.

(2) Develop general guidelines for categories of news issue coverage that news outlets need to cover in significant depth. News outlets should, for example, have an obligation to gather and report news content in several general topic areas within certain time parameters.

In the United States, the government agency responsible for implementing such proposals is the FCC. In 1934, Congress delegated to the FCC a broad power to promote the "public interest, convenience and necessity" through the granting and renewal of licenses to broadcasters.[36] Government agencies, it has been observed, come in two kinds: "Deliver the Mail" or "Holy Grail."[37]

36. 47 U.S.C. §§ 307, 309 (2000).

37. Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: Search for the Holy Grail*, 50 Fed. Comm. L.J. 605, 606 (1988) (quoting Taylor

Some agencies have neutral, mechanical, logistical functions, while others pursue a "more controversial and difficult mandate to realize some grand, moral, civilizing goal."[38] Because of the public interest standard, the FCC is decidedly of the latter kind. The courts have given substantial deference to the FCC in implementing this standard.[39] Few independent regulatory commissions operate under such a broad grant of power with so few substantive guidelines.[40]

The two proposals I have set out here would require the FCC to use its "Holy Grail" powers in a manner to which it has grown unaccustomed. Partitioning news from editorial and advertising of news, and establishing category-based guidelines

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Branch, *The Culture of Bureaucracy: We're All Working for Penn Central*, WASH. MONTHLY, Nov. 1970, at 8, 20).

38. *Id.* at 605.

39. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (quoting FCC v. Nat'l Citizens Comm'n for Broad., 436 U.S. 775, 810 (1978).

> Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. . . . The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside . . . for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance . . . ."

Id. Justice Scalia has cited the public interest standard as an example of how far the Court will go in sustaining broad congressional delegations. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474 (2001) (citing NBC v. United States, 319 U.S. 190, 216–17 (1943)).

40. There has long been debate over whether the FCC's public interest standard exceeds congressional delegation powers. *See, e.g.*, Ernest Gellhorn, *Returning to First Principles*, 36 AM. U.L. REV. 345, 347 (1987) (arguing that "[s]tatutes that allow administrators to determine what is in the 'public interest, convenience or necessity' simply fail as exercises of power . . . because they leave basic normative issues unanswered and thus within the realm of the delegate"); *see also* Gary Lawson, *Delegation and The Constitution*, 22 REGULATION 2, 23, 29 (1999), *available at* http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf (identifying the FCC's public interest standard as "easy kill number one" among statutory provisions that should be struck down for overbreadth). The public interest standard has been challenged on the grounds that Congress's permission to let the FCC enforce the "public interest" violates the separation of powers because it is an unconstitutional delegation of the legislative role. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 FED. COMM. L.J. 427, 453 (2001) (arguing that the "public interest" is so vague that "it can mean whatever three FCC commissioners say it means on any given day"). May predicts the courts may try to reign in the FCC's use of the public interest standard, because "it is not too much to ask that lawmakers assume responsibility for making the most fundamental and basic policy judgments." *Id.* While these judgments may remain somewhat general, that "is far better than a delegation that provides no meaningful guidance at all." *Id.* at 455.

for news issue coverage would involve the FCC in a brand of programming content regulation that it has not exercised since the late 1970s.

The deregulation of the early 1980s brought massive changes to the FCC. Ronald Reagan was the first President in history to appoint FCC Commissioners "whose primary objective was to eliminate FCC regulations."[41] Reagan's appointment as FCC chairman, Mark Fowler, brought with him the presumption that broadcasting is a business, like any other, and that the FCC should let the business be subject to market forces, as was preferable in any other venue. Fowler thought of television as "just another appliance . . . a toaster with pictures."[42] His approach was to allow the market to regulate broadcasting. The FCC "should, so far as possible, defer to a broadcaster's judgment about how best to compete for viewers and listeners, because this serves the public interest."[43] The days of FCC efforts to discern the public interest, in Fowler's view, should come to an end with respect to content regulation.[44] The FCC should defer to broadcasters' judgment. In turn, broadcasters would respond to market demand: "[T]he public's interest must determine the public interest."[45]

Over the early 1980s, the FCC jettisoned many of its policies that included content regulation, but not all of them. In recent years, the regulation of indecency and obscenity in broadcasting and cable has become a major preoccupation of the FCC.[46] The FCC has demonstrated that when it wants—especially at the prodding of outraged football-watching parents or Grammy watchers with tender ears—it can act swiftly and forcefully to impose fines for particular content. When Janet Jackson exposed a breast during the Super Bowl halftime show, the FCC acted promptly to censure the TV networks, and to implement

41. JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 233 (1991); *see also* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

42. Bernard Nossiter, *The FCC's Big Giveaway Show*, NATION, Oct. 26, 1985, at 402.

43. Mark S. Fowler, *The Public's Interest*, 56 FLA. BAR J. 213, 213 (1982).

44. *See generally* Wilfred C. Rumble, Note, *The FCC's Reliance on Market Incentives To Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right To Receive Critical Information*, 28 U.S.F. L. REV. 793, 831 (1994).

45. Fowler, *supra* note 43, at 216; *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582 (affirming FCC's authority to use "market forces" to determine the public interest).

46. *See* Stephen Labaton, *Powell To Step Down from F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005, at A1.

new policy.[47] When singer Bono uttered "fucking brilliant" at an awards show, the FCC first forgave him, and later reversed itself in a moment of anguish.[48]

Thus, the FCC's stance toward content regulation is not one of total renunciation. Rather, the kind of content regulation the FCC should pursue involves a tug-of-war of values. There is no doubt that the FCC's preoccupation with indecency and obscenity springs from a response to strong moral concerns among voters. One of the reasons the FCC has, against its general deregulatory trend, persisted in policing for indecency and obscenity is because of the prodding of Congress.

As I argued in Part I, however, strong moral reasons also exist for ensuring that the public receives access to quality news on a wide scope of issues. For the FCC to return its focus to news, however, many other things would need to change. The FCC would need to find reasons to advance content-based regulations farther, perhaps, than it has ever taken them. In the past, the FCC found reasons under the scarcity rationale to limit the use of editorials and advertising in broadcast news coverage and to require television stations to undertake significant efforts to ascertain and cover important public issues. As several of the major news networks are now produced for cable and satellite, rather than broadcast transmission, however, the FCC would need to extend its jurisdiction significantly in order to reach the programming content of, for example, Fox News, MSNBC, or CNN. The FCC *has* been willing to take this step with respect to indecency and obscenity, but it is unclear whether it would for the regulation of televised news. It would involve nothing less than a new season for the FCC's use of the public interest standard.

To put the alternatives starkly, we must ask whether the display of indecency and obscenity is a more serious problem than the content of televised news. I believe that the problem of the quality of news coverage, especially in its televised form, is a more fundamental problem. Furthermore, it is a problem that, unlike the policing of indecency and obscenity, the FCC is specially

47. Frank Ahrens & Lisa de Moraes, *FCC Is Investigating Super Bowl Show: Halftime Performance Faces Indecency Standards Test*, WASH. POST, Feb. 3, 2004, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A5746-2004Feb2? (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

48. Paul Davidson, *Crackdown on Cursing Starts with Bono*, USA TODAY, Mar. 8, 2004, *available at* http://www.usatoday.com/money/media/2004-03-08-bono_x.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

qualified to address. The Justice Department can police indecency and obscenity. But, since its earliest days, the FCC has recognized that its charge to regulate according to the public interest involves posing basic questions about the health of American democratic life. While important, indecency and obscenity do not rise to the same level.

The new season for the FCC's use of the public interest standard would involve three main tasks, and the remainder of this section will take them up in turn.

First, it is necessary to figure out under what theory, if any, the FCC can regulate things that are crucially important to the public interest such as televised news, regulate them across broadcast, cable, and satellite technologies, and regulate consistently with the intent of Congress and the First Amendment.

Second, it is necessary to figure out where, if anywhere, there is a basis in FCC doctrine for regulating televised news.

Third, it is necessary to figure out how, going forward, permissible regulations of televised news can be implemented with the least risk of government censorship.

A. *Reconsidering the Theory That Justifies FCC Content Regulation*

In 1960, Newton Minow stepped to the podium as the new Chairman of the FCC to address the National Association of Broadcasters. He challenged them to watch television for an entire day. "I can assure you that you will observe a vast wasteland," he remarked; "The people own the air . . . . For every hour that the people give you, you owe them something. I intend to see that our debt is paid with service."[49] Minow was stating the classic "scarcity" interpretation of the public interest standard—broadcasters owe service to the public in return for the use of limited airwaves.

In 1998, the Gore Commission issued its report on the public interest obligations of digital television broadcasters, beginning with a statement that echoed Minow's: "As this Nation's 1600 television stations begin to convert to a digital television format, it is appropriate to re-examine the social compact between broadcasters and the American people."[50] The Gore Commis-

49. James L. Baughman, *Minow's Viewers: Understanding the Response to the "Vast Wasteland" Address*, 55 FED. COMM. L.J. 449, 450 (2003) (quoting Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (1961)).

50. *See* ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE, FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGI-

sion's charge was to consider both how traditional public interest standard obligations applied to digital television, and whether there are any new obligations that arise.[51] Ultimately, the Committee offered several recommendations that affirmed older commitments to education, diversity, and disclosure of efforts to fulfill obligations.[52] But, there was no consensus recommendation on new rules.[53] The report acknowledged that the public interest obligations that followed from the social compact between broadcasters and the public were more difficult to figure out than they used to be: "[T]he vast new range of choices in digital television makes it impossible to transfer summarily existing public interest obligations to digital broadcasting."[54] While the Gore Commission entitled its report "Charting the Digital Broadcasting Future," it did not take the steps to ponder what theory supported those steps; it concluded that the basis of public interest obligations is still found in the scarcity rationale.[55]

TAL TELEVISION BROADCASTERS xi (1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Gore Commission Report]. President Clinton initiated the Advisory Committee on Public Interest Obligations of Digital Broadcasters to consider the public interest responsibilities of television providers in the digital age. Known popularly as the Gore Commission, the committee brought together heads of the television industry and numerous experts in the field, such as Leslie Moonves, Norman Ornstein, and Newton Minow himself.

51. *Id.*

52. The Advisory Committee found that the public interest must be served with respect to six categories: diversity of programming, political discourse, localism, children's educational programming, access for persons with disabilities, and equal employment opportunity. *See id.* at 18–33. The Committee did not make televised news an important focus, though it did include recommendations for news as part of its "Voluntary Code of Conduct." The Commission made the following specific recommendations about news: (1) coverage should be "both substantive and well-balanced"; (2) inessential morbid, sensationalistic, or alarming details should be avoided, especially with regard to crime and sex; (3) news reporting should be factual, fair, and without bias; (4) broadcasters should exercise "particular discretion" in acceptance, placement, and presentation of advertisements during news broadcasts, so that advertisements are distinct from news content; (5) commentary and analysis should be clearly identified as such; (6) pictoral content should be chosen careful to avoid misleading, prurient, or sensationalist content; (7) interview programs should be governed by accepted standards of journalism; (8) stations should make "an effort to devote enough time to public issues to permit genuine understanding of problems and disagreements." *Id.* It is useful to remember that the work of the Gore Commission, from 1997–98, slightly pre-dated the rise of the 24-hour news networks.

53. *Id.* at xv.

54. *Id.* at xiii.

55. *See id.* at xii.

While scarcity has been the dominant rationale for FCC authority over broadcasting, it is not the only theory available. In fact, within the generous space afforded by Congress to the FCC under the public interest standard, the courts have sustained at least three theories that support granting less First Amendment protection to broadcasters than to other forms of mass communication: scarcity, pervasiveness, and special impact.

The scarcity theory postulates, specifically, that the electromagnetic spectrum that enables the broadcast of radio or television is a scarce resource, and since chaos results from the attempt to broadcast on the same channels, the government is needed to regulate broadcasting. Since companies licensed by the government gain lucrative use of a scarce resource, the government may demand that licensees fulfill obligations to the public in return for use of those airwaves.[56]

The Court has also used the scarcity rationale to give the FCC authority—á la Minow—as a trustee of the public interest.[57] Under this theory, the First Amendment is a collective right in which "the right of viewers and listeners . . . not the right of broadcasters . . . is paramount."[58] The FCC and the Court must balance broadcasters' editorial discretion against the public's interest in information. Where increased editorial discretion would lead to better information, courts will uphold the right of the broadcaster.[59] As a further corollary, the Court has held that the airwaves are public domain, and that consequently the FCC can lay down ground rules.[60]

> The fundamental legal framework that still governs the broadcast industry, based on the notion of "spectrum scarcity," sets it apart from other media. Congress has mandated that licensees serve as "public trustees" of the airwaves. Broadcasters have affirmative statutory and regulatory obligations to serve the public in specific ways. The U.S. Supreme Court has upheld the public trustee basis of broadcast regulation as constitutional.

Id.

56. NBC v. United States, 319 U.S. 190 (1943) (upholding FCC's early radio network regulations).

57. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969); CBS v. FCC, 453 U.S. 367 (1981).

58. *Red Lion*, 395 U.S. at 390.

59. *See, e.g.*, Columbia Broad. Sys. v. Democratic Nat'l Comm'n, 412 U.S. 94, 102 (1973); FCC v. WNCN Listener's Guild, 450 U.S. 582, 604 (1981); *Red Lion*, 395 U.S. at 393.

60. *Democratic Nat'l Comm'n*, 412 U.S. at 101; *see also* 47 U.S.C. § 309(h) (2000) (codifying view that airwaves are public domain).

A second theory, arising largely from the Supreme Court's landmark ruling in *FCC v. Pacifica Foundation*,[61] reasons that since radio and television broadcasts have a "pervasive presence" in American life that may harm certain persons (especially children), broadcasters may be regulated by the government. The Court based its reasoning on a right of privacy in one's home or car.[62] Where broadcast signals may enter a home or car without notice, the government may have an interest in regulating broadcasts for indecent language, for example, an interest in protecting children from indecent language.[63]

Finally, the Court has also sustained FCC regulations on the grounds that broadcasting has a "special impact" on viewers. The basic premise of the impact theory is that television can be regulated because it has a unique power to affect the public; in particular, it has the capacity to shape the public's views of important social and political topics. For example, under the special impact theory, the FCC can obligate a broadcaster to air anti-smoking commercials, because the impact of pro-smoking advertisements on a "captive audience" is so strong that the public interest is served by letting the public hear arguments against smoking.[64]

Each of these three theories has shortcomings. The critics of the scarcity doctrine are numerous, and their arguments grow more compelling with developments in technology. Christopher Yoo, for example, argues that with the development of cable and satellite television, scarcity is no longer a reality for viewers.[65] The broadcast model, based in the scarcity of electromagnetic waves, has become a "regulatory scheme in search of its own justification," and the "decades-long ordeal" to settle the First Amendment standard to govern cable television and digital television will lead to yet further regulation that violates the First Amendment.[66] Yoo contends that the efforts of the Gore Commission, Cass Sunstein, Owen Fiss, and others are revisionist attempts to recapture a technology-specific rationale for regula-

61. 438 U.S. 726, 748 (1978) (upholding sanctions against Pacifica for airing George Carlin's indecent "Dirty Words" monologue because it was accessible by children without notice).

62. *Id.*

63. *Id.*

64. Banzhaf v. FCC, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968).

65. *See generally* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

66. *Id.* at 356.

tion and extend them to current conditions, though the technology no longer warrants them.[67]

The pervasive presence theory has always been limited in explanatory power. It works best to support the FCC's regulation of obscenity and indecency. If our idea of the public interest is broader than the regulation of obscenity and indecency, then the theory does not explain much. The idea that broadcasting can enter into a home unexpectedly does not support other kinds of regulation based on content. The Supreme Court continues to use the pervasive presence rationale but has shown little inclination to extend it.[68] The pervasive presence theory continues to be the basis for FCC content regulation of indecency and obscenity regulation, though some believe *Pacifica*'s reasoning will not support regulation of cable and satellite television.[69]

It is the last theory, the special impact theory, that is most inviting as a continuing basis for FCC regulation of television under the public interest standard. It is largely harmonious with the pervasive presence doctrine, except that it applies to all viewers, rather than only vulnerable viewers. In contrast to the scarcity doctrine, which renders broadcasting unique because of a particular and increasingly outmoded technological novelty, the special impact theory enables a full comparison between television and other media. While it may not be easy, it is possible to make reliable estimates of whether television affects viewers more profoundly than, for example, radio or a newspaper. Further, it permits distinctions *within* a medium. Just as there are meaningful distinctions between magazines and newspapers as print media, there are meaningful distinctions between news programs and prime time television dramas. Finally, the theory provides a much needed common starting point for considering why television should be regulated regardless of how it is delivered—by broadcast, cable, or satellite. The scarcity rationale, the Supreme Court has ruled, does not apply to cable.[70]

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67. *Id.*; *see also* Fiss, *supra* note 6; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

68. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 744–47, 755–59 (1996) (applying pervasive presence theory and holding that cable operators may prohibit sexually explicit content on leased access channels, but that prohibiting indecent or obscenity material on public access channels and use of "segregate and block" provision violated First Amendment).

69. Fox is preparing a challenge to an FCC fine levied for alleged indecency on its program "Married by America." *See* Frank Ahrens, *Fox Calls For Court Review of Standards*, WASH. POST., Dec. 4, 2004, at E01.

70. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (refusing to apply the scarcity rationale to cable television).

The special impact theory is not without difficulties. First, it runs counter to basic principles of First Amendment law. Ordinarily, the First Amendment is held to protect speech, even where the speech has a strong impact. Speech is not punished for being strong, powerful, and persuasive. Second, the theory can provide a "dangerously amorphous justification for regulation" because it provides "no clear limits to official authority and invites censorship as well as affirmative regulation."[71] Third, it is difficult to judge impact. Is impact judged simply by viewership? By credibility? Descriptively? Or some other indicia? Finally, there is always the possibility that we may overestimate the novelty of a feature of television or a trend in programming and regulate too hastily.

All of these criticisms are forceful, and they descend on a core concern: the special impact theory is an incomplete theory. That is, the observation that television or some other media has a strong impact on viewers does not do enough work to help us draw the difficult lines we must draw between speech that is strong but not worth regulating and speech that needs to be regulated because it is strong, or between harmful and not harmful strong speech. If the special impact theory simply says that wherever television exerts significant power and persuasion then it must be regulated, it is surely overbroad.

I think it is possible to concede that the special impact theory is incomplete, but that it is worth keeping. It guides us to consider dimensions of televised media that we may miss otherwise, but it must be buttressed by another theory that helps draw the lines necessary to prevent it from becoming an amorphous invitation to censorship.

There will be disagreements about what, if any, theory is appropriate to buttress the special impact theory. It is not within the scope of this Note to offer a full defense of an argument to support the special impact theory. As a starting place, I would point to a group of authors and Supreme Court opinions that rank the enhancement of the democratic process highly or highest among the values enshrined in the First Amendment.[72]

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71. Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 15 (1976).

72. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Fiss, *supra* note 6; SUNSTEIN, *supra* note 67; Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 503–04 (2000); William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting); Associated Press v. United States, 326 U.S. 1 (1945); New York Times Co.

The argument, in brief, would be that television has a special impact on viewers, and televised news has a special impact on a democratic polity. The manner in which a televised medium shapes the news, and what it leaves out, impacts the democratic process. The government can regulate televised news, despite the limitations of the First Amendment, because, in Justice Black's words, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[73]

The few cases that have relied on the special impact theory have applied it to situations where there is a risk that the wealthy and powerful will dominate public discourse through repetition of messages to "captive" audiences. In *Banzhaf*, the D.C. Circuit upheld an FCC ruling that licensees must devote a significant amount of time to anti-smoking commercials on the rationale that pro-smoking advertisements made such an impact on viewers that the FCC could mandate an answer to them.[74] Answering the objection that the FCC cannot regulate the content of programs, the D.C. Circuit stated that "neither courts nor Commission have thought it had to make its decisions among competing applicants blindfolded to the content of their programs."[75] The court clarified its basis for the content regulation:

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirma-

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v. Sullivan, 376 U.S. 254 (1964). One may contrast this "democratic process" with the "truth" perspective identified with Oliver Wendell Holmes and John Stuart Mill, and the "autonomy/realization" perspective identified with Redish.

73. *Associated Press*, 326 U.S. at 20.

74. Banzhaf v. FCC, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968).

75. *Id.* at 1094–95

> If agency power to designate programming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest. And whatever the limits imposed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.

Id.

> tive act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[76]

Thus, the impact of television on "an ordinary habitual television watcher" was an adequate justification to regulate advertisements on the basis of content.

The Supreme Court drew upon *Banzhaf*'s language and reasoning in the high profile *CBS v. Democratic National Committee.*[77] The Court upheld an FCC ruling that the Fairness Doctrine—which required free air-time for responses to on-air attacks—did *not* require CBS to air political advertisements critical of the Nixon administration.[78] The Commission, the Court held, was entitled to take into account "the reality that in a very real sense listeners and viewers constitute a captive audience."[79] The Court rejected the lower court's conclusions that the FCC acted paternalistically and discriminatorily in denying the Democratic National Committee advertising access.[80] The FCC was justified in concluding that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth."[81] Moreover, there was "substantial danger" that the time allotted for editorial advertising could be monopolized by those of one political persuasion.[82]

Importantly, the Court demonstrated in *Democratic National Committee* that, on these facts, the special impact theory trumps the well-entrenched scarcity doctrine. In fact, the special impact theory even limited political speech in this instance. The Court subjugated the operation of the Fairness Doctrine, grounded in the scarcity doctrine, to an overriding concern with the consequences of a policy that would permit the rich, influential, and politically powerful to dominate the airwaves. "With broadcasting, where the available means of communication are limited in both space and time," the Court stated, "the admonition of Professor Alexander Meiklejohn that 'what is essential is not that everyone shall speak, but that everything worth saying shall be

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76. *Id.* at 1100–01.
77. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
78. *Id.* at 128.
79. *Id.*
80. *Id.* at 130–31.
81. *Id.*
82. *Id.*

said' is peculiarly appropriate."[83] The Court affirmed that the FCC is justified in saying "no" to the wealthy and politically powerful who seek to profit from rules (Fairness Doctrine) made to benefit those who are not so easily heard.

Banzhaf and *Democratic National Committee* both apply the special impact theory where wealth and power are likely to dominate speech in a medium that creates a special impact on viewers or listeners. Accordingly, televised news should continue to receive less First Amendment protection than newspapers, the Internet, and perhaps even radio, not because they are "scarce," or "pervasive," but because of the kinds of reasons cited in *Banzhaf* or *Democratic National Committee*. Viewers are a "passive" and "captive" audience; the ability of particular advertisers, political parties, or other individuals or entities to gain regular access to the televised forum creates a situation where it is less likely that "everything worth saying" can be said.

That *Banzhaf* arose in the context of advertising suggests that there may be some overlap in intuition between the special impact theory and the commercial speech doctrine.[84] That is, there is less First Amendment protection for commercialized speech; indeed, the government may regulate such speech where it harms the public by misrepresentation. Television may receive less First Amendment protection because its speech may be harmful or misleading; since it has properties that make it hardier than other kinds of speech, there is not the risk that television's speech will be "chilled" by regulation.[85]

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83. *Id.* at 122 (quoting MEIKLEJOHN, *supra* note 72, *at* 26 (1948)). Meiklejohn's work exercised a strong influence on the Supreme Court's First Amendment jurisprudence. *See* Brennan, *supra* note 72. The Court here adopts, at least in part, Meiklejohn's worries about the dominance of public discourse by commercial interests. *See* MEIKLEJOHN, *supra* note 72, at 163 ("The commonly urged identification of Constitutional freedom with the freedom of business enterprise is an illusion which could be entertained only in a society which is too busy in seeking success to give time or energy to finding out what success is.").

84. Several important Supreme Court commercial speech decisions have approvingly cited *Banzhaf* for the proposition that the government may enforce greater restrictions on commercial speakers in the electronic media. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570–71 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Bigelow v. Virginia, 421 U.S. 809, 825 (1975).

85. My argument here is not that television news providers ought to be regulated under the commercial speech doctrine; that is unnecessary because broadcasters already receive less First Amendment protection than commercial speakers. Some of the intuition behind the commercial doctrine is applicable here, however, and the relation of news to the commercial speech doctrine provides another example of the unique relationship of televised news under

the First Amendment. The connection between televised news and commercial speech arose recently in an interesting context. In 2003, the Supreme Court took an appeal from the California Supreme Court in the widely publicized case of *Nike v. Kasky*. In *Nike*, a group of plaintiffs brought suit for injunction and damages against athletic apparel giant Nike, claiming that it made public statements regarding its labor practices in Asia that were misleading under state law. Kasky v. Nike, 45 P.3d 243 (Cal. 2002). The California Supreme Court upheld a verdict for the plaintiffs. Many expected that Supreme Court would use the case to resolve the uncertain law surrounding the commercial speech doctrine, but ultimately the Court declined to hear the case. Nike v. Kasky, 537 U.S. 1099 (2003), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003). The major television news outlets took a keen interest in the *Nike* case and filed *amicus curiae*. *See* Brief Amici Curiae of Thirty-Two Leading Newspapers, Magazines, Broadcasters, and Media-Related Professional Associations (Listed on the Inside Cover) In Support of Petitioners, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003) (No. 02-575). Included among the amici were ABC, CBS, Cable News Network, Fox, National Association of Broadcasters, and the National Broadcasting Company. The brief contends that upholding the California Supreme Court's decision would inhibit the media's ability to report on issues of public concern regarding corporate America. Noticeably absent from the amicus brief, however, is self-consciousness on the part of the media that they themselves may be part of the corporate America whose statements about its own products (e.g., "Fair and Balanced" news) may be at risk. No Supreme Court case has yet considered the conduct of a major media outlet as commercial speech. But, the intuition behind the commercial speech doctrine may be applied to the lucrative commerce in televised news. The intuition is that certain statements by television news companies regarding its news product may be false or misleading, and these labels may be harmful to the public. Recently, Common Cause and MoveOn.org, Inc. filed a petition with the FTC alleging that Fox's claim to be "Fair and Balanced" is a deceptive trade practice. *See* Letter from Wes Boyd, President and Founder, MoveOn.org, Inc., and Chellie Pingree, President, Common Cause, to Division of Enforcement, Bureau of Competition, Federal Trade Commission (July 19, 2004), *available at* http://cdn.moveon.org/content/pdfs/ftc_filing.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Televised news confounds the categories of the commercial speech doctrine. The Supreme Court has offered two reasons for providing less First Amendment protection for commercial speech than other kinds of protected speech. First, commercial speech can be expected to be more objective than noncommercial speech because its truth is more easily verifiable. *Va. Pharmacy Bd.*, 425 U.S. at 772. A speaker may be held to a higher standard under regulations if it is easier for the speaker to find out accurate information. Thus, where a speaker must dig information out of recalcitrant or unreliable sources, the speaker cannot be held to as high of a standard. *Virginia Pharmacy* uses the news as an example of speech that cannot fall under the commercial speech doctrine:

> The truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.

Id.

The special impact theory provides a promising basis for FCC regulation of televised news. Admittedly, the use of the theory leaves some issues up in the air. While the theory is used to reach the holdings in *Banzhaf* and *Democratic National Committee*, these cases upheld FCC interpretations of the use of the Fairness Doctrine, which is no longer FCC policy. Further court holdings would be crucial to understanding the contours of the theory of democratic equality or participation that appears to underlie the special impact theory. As I have argued here, we can learn enough from these opinions to analogize their reasoning to affirm an FCC policy that promotes standards designed to ensure that wealthy or politically connected voices do not dominate the television medium, because television has a strong impact on viewers. On the commercial speech analogy, as well, we can adopt the reasoning that the FCC can impose content regulations where there is a risk that certain commercialized news products may, by their misleading character, present harm to the public.

With respect to regulation of televised news, the special impact theory—if correct—would help solve a very important problem. Because it is not technology specific, the special impact theory could sustain FCC regulation across broadcast, cable, and satellite technologies. The typical cable subscriber at the moment has little idea that the FCC has authority over the

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That is, news reporting provides an example of the kind of speech that is least appropriate for the commercial speech doctrine, since news is about inquiring; its truth is difficult to verify. The second rationale for lower protection for commercial speech is that commercial speech is done for a profit; it is therefore "hardier" than other forms, and has greater resistance to the chilling effects of regulation. *Va. Pharmacy Bd.*, 425 U.S. at 772 ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."). Kozinski and Banner, in an article highly critical of the commercial speech doctrine, use precisely the example of news as a challenge to the "hardier" justification by showing that profit-making enterprises often receive extensive First Amendment protection:

> Anyone paying attention to the consolidation of the newspaper industry in recent years will recognize that newspaper publishing is big business. A look at the salaries of television anchor people will tell you the same about news broadcasting. Film producers, book publishers, record producers—all who engage in their chosen profession for profit—are fully protected. Profit motive is clearly not a factor very useful for classifying speech.

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 , 637 (1990).

Thus, news reporting sets at the extremes: it is among the least "verifiable" of kinds of information, so the speaker of news receives high First Amendment protection though the speech is commercial, but nevertheless, the news is also a highly profitable mode of difficult-to-verify commercial speech.

content of only a handful of the channels on a cable plan, and not others. To an increasingly larger number of viewers, the differences between broadcast media defined by scarcity and cable and satellite media that are not hooked to scarcity means little or nothing in practice. The viewer is potentially impacted by channels from both categories equally. The special impact theory would provide a basis for FCC regulation that can close the gap between the experience of viewers and the authority of the FCC to regulate content.

B. *The Doctrinal Basis for Content Regulation of Televised News*

FCC regulation of the content of news-related material is not new. Quite the contrary; prior to the 1980s, the FCC had a wide range of policies, the goal of which was to ensure that television networks carried news programs and that an adequate range of topics, including several categories related to news and other public affairs, was met. At the height of such policies, local news stations were even required to do their own investigation of their communities in order to learn what news should be covered. These policies were not always sound, and the FCC has turned away from most of them. Some, however, were beneficial. It is worth reviewing some of the major FCC initiatives with an eye to how they addressed the relation of news, editorials, and advertising. The FCC, as we will see, has used policies that aimed to limit the effect of editorial and advertising and to promote categories of coverage.

Since its inception, the FCC has had clear authority to regulate content. In *NBC v. United States*,[86] the Supreme Court upheld the authority of the FCC to regulate the content of broadcasting. The Court held that the FCC's powers are "not limited to the engineering and technical aspects of regulation of radio communication . . . . [T]he [Communications Act of 1934] does not restrict the Commission merely to supervision of the

86. 319 U.S. 190 (1943). *NBC* clarified several matters regarding FCC power. First, the Court affirmed the right of the FCC to exercise broad powers over the broadcasting industry. Second, it affirmed that the public interest standard is the touchstone of FCC authority to exercise broad regulatory powers. Third, it held that the public interest standard is not unconstitutionally vague. Fourth, it offered a scarcity rationale—the notion that regulation is necessary because the airwaves are limited—as justification for the public interest standard and for content regulation. Finally, the Court ruled that regulations that may result in license revocation or nonrenewal do not violate broadcasters' First Amendment rights.

traffic. It puts upon the Commission the burden of determining the composition of that traffic."[87]

While the FCC can determine the composition of network traffic, the Court has acknowledged that the FCC must walk a "tightrope" to preserve the First Amendment values of the Communications Act of 1934.[88] Officially, the power of the FCC under the public interest standard stops at censorship.[89] But, the Supreme Court has also stated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[90]

Since the earliest days of broadcasting, Congress and the courts have permitted the Federal Radio Commission ("FRC")[91] and its successor, the FCC, to regulate news, editorials, and

87. *NBC*, 319 U.S. at 215–16 ("[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.").

88. Columbia Broad. Sys. v. Democratic Nat'l Comm'n, 412 U.S. 94, 117 (1973).

89. *See* 47 U.S.C. § 326 (2000) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."). *See also Democratic Nat'l Comm.*, 412 U.S. at 118 (stating that the Commission must "oversee without censoring").

90. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); *see also* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (holding that broadcasters are subject to lower levels of First Amendment protection than newspapers).

91. The FRC preceded the FCC. The federal government first began its attempt to regulate broadcasting in 1910, with the Wireless Radio Act, which required steamships within 100 miles of American coasts to maintain radio equipment and have a skilled operator on board. The Radio Act of 1912 sought to control the use of radio frequencies, but soon the number of radio broadcasts exceeded available wavelengths, and listeners often received several broadcasts on the same channel. In response, Herbert Hoover, then Secretary of Commerce, called a series of conferences on radio from 1922 to 1926. The courts, however, did not uphold Hoover's use of regulatory authority over radio yielding from these conferences. By 1926, the federal courts ruled that licensees were not bound by the Secretary's allocations of frequencies or settings of hours of operation. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). Congress acted to preserve the federal government's ability to regulate broadcasting. In the Radio Act of 1927, Congress established a comprehensive regulatory framework for broadcasting, and set up the Federal Radio Commission (FRC). Radio Act of 1927, 44 Stat. 1162, *repealed by* Communications Act of 1934, 48 Stat. 1064, 1102. In response to concerns about the fragmentation of responsibility for regulation within the federal government, Congress enacted the Communications Act of 1934, establishing the FCC. Communications Act of 1934, §§ 151–609, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–609 (2000)).

advertising. The FRC promulgated general principles in pursuit of the public interest standard that promoted coverage of public affairs and placed limits on both advertising and editorializing.[92] In its early years, the FCC entirely prohibited editorials by broadcasters[93] and sought the elimination of commercial advertising.[94]

Over the 1940s, the FCC eased its position on editorials. The 1949 benchmark *In re Editorializing by Broadcast Licensees* carefully circumscribed the use of editorials by broadcasters with duties to the public:

Congress had given the FRC authority to regulate for the public interest and necessity and kept the same language in the Communications Act of 1934.

92. *See* Statement Made by the Commission on August 23, 1928 Relative to the Public Interest, Convenience and Necessity, 2 F.R.C. Ann. Rep. 166 (1928), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 127–33 (F. Kahn ed., 4th ed. 1984). The FRC principles included: (1) A substantial band of frequencies should be allocated to commercial broadcasting; (2) The Commission should act to improve radio reception and decrease interference; (3) The Commission should seek a fair distribution of different kinds of service; (4) Duplication of programming types should be avoided and use of phonograph records limited; (5) Advertising should be limited and should be incidental to "real service"; (6) Station transmitter location should be determined with respect to station power and population density; (7) Financial responsibility and past record should be significant license qualifications; (8) Use of radio frequencies for private messages or viewpoints should be strongly discouraged; (9) Public announcements (in the press) of station operating schedules should be encouraged; (10) Broadcasters should not use a transmitter other than the one licensed; and (11) Licensees should be responsible for maintenance of transmitters and proper frequencies. *Id.* The Commission listed several requirements of the public interest:

> [A]mple play for the free and fair competition of opposing views," and "the tastes, needs and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place."

In re the Application of Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33–34 (1929).

93. Mayflower Broad. Corp., 8 F.C.C. 333 (1941). Until recently, editorializing was still prohibited on public television. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984) (invalidating FCC ban on editorializing on public television).

94. FCC, *Public Service Responsibility of Broadcast Licensees* (Mar. 7, 1946) ("Blue Book"), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING, *supra* note 92, at 149–63. The *Blue Book* did not have the force of law, but specified four areas of emphasis: (1) carrying sustaining programs; (2) carrying local live programs; (3) carrying programs devoted to public discussion; (4) eliminating commercial advertising expenses. The FCC used these standards to help evaluate the license renewals of broadcasters.

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[95]

The FCC argued that these restrictions on broadcasters were constitutional because the First Amendment did not allow broadcasters "to exclude the expression of opinions and ideas" with which they disagreed.[96] The public is the boss: "[I]t is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast . . . which is the foundation stone of the American system of broadcasting."[97] Paradoxically, the First Amendment could only be fully satisfied by "giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes."[98]

The Fairness Doctrine developed out of *Editorializing* as a way of monitoring the use of editorials by broadcasters.[99] The Fairness Doctrine included two requirements. First, it required coverage of important public issues. Three factors help determine whether an issue was of public importance: (1) the impact the issue was likely to have on the community at large; (2) the degree of attention the issue had received from government offi-

95. Editorializing by Broad. Licensees, 13 F.C.C. Rep. 1246, 1249 (1949) [hereinafter *Editorializing*].

96. *Id.* at 1256.

97. *Id.* at 1249.

98. *Id.* at 1257.

99. *Id.* at 1246. The Fairness Doctrine was an FCC doctrine, not a congressional mandate. Congress made reference to the doctrine, but did not codify it. *See* 47 U.S.C. § 315(a), 73 Stat. 557 (1959). But see Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 517–18 (D.C. Cir. 1986) (holding that § 315(a) did not codify the Fairness Doctrine).

cials and community leaders; and (3) the amount of media coverage devoted to the issue.[100]

The second requirement was known as the *Cullman* Doctrine, and it required a broadcaster to air an opposing viewpoint to a controversial issue presented during its broadcast.[101] The FCC required a licensee to offer time for a response within seven days after a broadcast personally attacked an individual, or when the station editorially endorsed a political candidate. Additionally, the broadcaster was required to provide materials, such as a transcript, to the attacked individual in order to facilitate a response.

According to the FCC, the Fairness Doctrine served the public interest in three ways. First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, the licensee is a public fiduciary, obligated to present diverse viewpoints representative of the community at large.[102] The need to effectuate the right of the viewing and listening public to suitable access to the marketplace of ideas justified restrictions on the rights of broadcasters. Second, a governmentally imposed restriction on the content of programming is the best mechanism by which to vindicate this public interest.[103] Third, as a factual matter, the Fairness Doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.[104] Through the Fairness Doctrine, the FCC limited broadcasters' autonomy both by requiring them to find out what news the public needed and to broadcast it, and by requiring broadcasters to provide free air time to views treated critically in the presentation of news.

In 1969, the Supreme Court upheld the Fairness Doctrine based on the theory that because airwaves are scarce and access to them limited, the government has an interest in assuring that opposing viewpoints of important issues were heard.[105] Broadcasters argued that the continued enforcement of the Fairness Doctrine may lead to self-censorship, because broadcasters would simply decline to air issues rather than air opinions with which they disagreed. In response, the Court strongly affirmed that the

100. 1974 Fairness Report, 48 F.C.C.2d at 11, 12 (1974).

101. Cullman Broad. Co. v. FCC, 40 F.C.C. 576 (1963).

102. Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 146–47 (1985).

103. *Id.* at 147.

104. *Id.*

105. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); CBS v. Democratic Nat'l Comm'n, 412 U.S. 94 (1973).

First Amendment not only permits, but compels the FCC to ensure adequate coverage of news:

> [I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.[106]

Thus, the Court largely reaffirmed the vision of *Editorializing*: the scarcity rationale, compounded by a concern over managerial censorship (broadcasters' "own views of fundamental questions"), was sufficient to sustain the FCC's authority to consider whether broadcasters maintained adequate news coverage when renewing licenses.

The FCC established categories of coverage to help evaluate whether a broadcaster's programming was adequate. In 1960, after nineteen days of hearings and testimony from over ninety individuals, the FCC issued its Programming Policy Statement, listing fourteen categories that licensees should meet, describing them as "[t]he major elements usually necessary to meet the public interest, needs, and desires."[107] The *1960 Programming Statement* did not have the force of law, but it advised coverage of public affairs, political and news programs, and permitted edito-

106. *Red Lion*, 395 U.S. at 393–94.

107. En Banc Programming Inquiry, 44 F.C.C. 2203, 2314 (1960) [hereinafter *1960 Programming Statement*]. The categories included: (1) opportunity for local self-expression; (2) the development and use of local talent; (3) programs for children; (4) religious programs; (5) educational programs; (6) public affairs programs; (7) editorialization by licensees; (8) political broadcasts; (9) agricultural programs; (10) news programs; (11) weather and market reports; (12) sports programs; (13) service to minority groups; and (14) entertainment programming. The FCC used these programming guidelines as standards to evaluate licenses. *See, e.g.*, Cmty. Broad. Co., 12 F.C.C. 85 (1947); Howard W. Davis, 12 F.C.C. 91 (1947).

rializing. It also required broadcasters to determine the tastes, needs, and desires of the community and design programs in accordance with them. By 1971, this policy turned into formal ascertainment requirements.[108] Broadcasters had to specify how community needs would be met. In 1975, the FCC issued further ascertainment rules, requiring that broadcasters conduct annual interviews with members of the public and leaders of significant community groups. The lists of concerns culled from these interviews, and broadcasters' efforts to meet them, were considered at license renewal time.[109]

By the late 1970s, the FCC reached the limits of its use of programming categories. In a 1977 opinion, the FCC rejected a proposal to base license renewal on a set of required quantitative minimums for news, public affairs, and local programming.[110] Previously, the FCC had been using a standard where if a renewal applicant could show in a hearing with a competing applicant that its programming service during the proceeding license term was "substantially attuned to meeting the needs and interests of the public served by its station, and that the operation of the station has not otherwise been characterized by serious deficiencies," then the renewal of the applicant is preferred over the newcomer, and the application for renewal is granted.[111] These comparative renewal hearings became bloated, however, pushing the FCC to consider proposals for quantitative criteria. The quantitative criteria would specify percentages of airtime that must be devoted to local programming, news, and public affairs programming.[112]

Formulation of Policies raised several sound objections to the use of quantitative criteria. First, the Commission reasoned that there will be many borderline disputes about whether an applicant has met specified standards. Also, there will be arguments about whether failure in one category amounts to insubstantial public service sufficient to lead to license denial. It will remain

108. Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650 (1971).

109. Ascertainment of Cmty. Problems by Broad. Applicants, 57 F.C.C.2d 418 (1975).

110. Report and Order, Formulation of Policies Relating to the Broad. Renewal Applicant, Stemming From the Comparative Hearing Process, 66 F.C.C.2d 419 (1977) [hereinafter *Formulation of Policies*].

111. *Formulation of Policies*, 66 F.C.C.2d at 420.

112. The particular proposal at issue set targets of 10–15% of broadcasting effort for local programming (including 10–15% of prime time), 8–10% for news for the network affiliate and 5% for the independent VHF station (with the same percentages of prime time), and 3–5% for public affairs programming, with 3% used for prime time). *Id.* at 421.

necessary to engage in qualitative evaluation of programs, not simply percentages of program composition. The requirements, the Commission continued, would "artificially increase the time most television stations devote to local, news, and public affairs programming." The result is more than the FCC desired, and it would be imprudent to "impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served"; the standards would not produce any significant improvement in the quality or efficiency of our comparative renewal hearing process, and may even have the effect of complicating it further.[113] On the whole, quantitative standards based on percentage of programs dedicated to different categories are "a simplistic, superficial approach to a complex problem."[114] The Commission determined that it was best to continue to use its case-by-case approach, with a presumption built in for successful past performance. The decision not to use quantitative categories for license renewal made it easier for licensees to gain renewal.

Importantly, the FCC turned away from the use of quantitative category-based standards as a matter of policy, not because the First Amendment forbade it from using them.[115] This close consideration of quantitative category-based programming standards may have marked the apex of the FCC's efforts at content regulation. From the late 1970s, the FCC began to move rapidly away from such regulation.

Over the course of the 1980s, most of the FCC content restrictions on editorializing and guidelines for programming were axed. In 1981, the FCC eliminated programming guidelines for radio.[116] Three years later, the FCC eliminated programming guidelines for television licensees as well.[117] In one fell swoop the FCC determined that the public interest would be served by (1) eliminating guidelines relating to non-entertainment programming and amounts of commercial matter presented by commercial stations; (2) deleting rules relating to

113. *Id.* at 428–29.

114. *Id.* at 429.

115. *Id.* at 427.

116. Deregulation of Radio, 84 F.C.C.2d 968 (1981).

117. Revision of Programming and Commercialization Practices, Report and Order, 98 F.C.C.2d 1076 (1984). When the FCC abandoned ascertainment requirements in 1984, it junked the *Blue Book* categories.

formalized community ascertainment; and (3) maintaining comprehensive program logs by stations.[118]

The FCC provided several reasons for the elimination of these programming guidelines. First, with respect to programming guidelines, the FCC concluded that the removal of the system where broadcasters were compelled to present prescribed amounts of programming in each of the traditional categories would permit individual broadcasters to be "more directly responsive to existing market forces."[119] Licensees would still be required to maintain quarterly issues or programs lists as a means of providing the public and the Commission with information necessary to monitor licensees' performances. The FCC believed that this "issue-responsive" framework would allow broadcasters more flexibility, while retaining some guidance. Any of the categories contained in the *1960 Programming Statement* would be characterized as issue-responsive, and thus broadcasters would still be rewarded for addressing those issues.[120]

The Commission removed the requirement that broadcasters undertake formalized ascertainment of local community concerns in order to keep their licenses. The rationale behind the ascertainment policy is that broadcasters could better figure out what served the public interest without having to take direct guidance from the government. The FCC pronounced the ascertainment "not successful,"[121] because the benefits did not justify the costs of the procedure: "Broadcasters do not operate in a vacuum and, as discussed above, it is in the economic best interest of the licensee to stay informed about the needs and interests of its community."[122]

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118. *In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirement for Commercial Television Stations, 98 F.C.C.2d 1076 (1984). These rules were challenged by numerous minority and citizens groups. On reconsideration the FCC stuck by its new rules, finding that "market incentives will ensure the presentation of programming that responds to community needs." *Id.* ¶ 2.

119. *Id.* ¶ 7. The guidelines for renewal application required Commission action on any application that proposed: (1) greater than 85% commercial programming; (2) less than 5% local live programming; (3) greater than 90% network programming; (4) less than 10% sustaining programming between 6–11 pm; (5) greater than an average of 12 commercial spots during an hour; (6) no programming in entertainment, religious, agricultural, educational, news, discussion unless adequate explanation was given. Note that it was *proposals* that were reviewed, not past performance. The FCC declined to use quantitative standards in review of past performance in 1977. *See Formulation of Policies*, 66 F.C.C.2d 419 (1977).

120. 98 F.C.C.2d 1076, ¶ 14 (1984).

121. *Id.* ¶ 19.

122. *Id.* ¶ 54.

The FCC dismantled the Fairness Doctrine, even over the will of Congress. In 1984, the FCC invited comments on the repeal of the Doctrine and, based on the comments, concluded that the Fairness Doctrine was unconstitutional and no longer served the public interest.[123] The FCC concluded that the interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information no longer required the Fairness Doctrine. The interest of the public in viewpoint diversity was served by the multiplicity of voices in the marketplace. Congress responded by passing legislation to codify the Fairness Doctrine, but it was vetoed by President Reagan. In 1987, the FCC officially abolished the Fairness Doctrine on the grounds that it violated the First Amendment and no longer served the public interest.[124] With this, the FCC had largely removed its news-related programming content regulations.

I re-emphasize that when the FCC decided to lift its standards for content regulation in the late 1970s and early 1980s, it did so for policy reasons, and not because the courts found First Amendment violations. The deregulators thought that markets would provide answers. With respect to news, markets have opened up new vistas—especially the 24-hour cable news networks—and filled them with the news/ed/ad mixture.

In response to the current news/ed/ad mixture, it is not prudent simply to swing the pendulum the other direction. Past FCC doctrine provides a record of what had worked prior to the enthusiasm for deregulation in the 1980s, but it does not provide a perfect analogy to the effort to regulate televised news. The FCC limited editorializing, limited advertising of news, and used mandatory categories as ways to improve the quality and extent of newsgathering. But, the 1977 *Foundation of Policies* opinion rejecting quantitative categories helps define the limits of what may be possible for the use of category-based standards of news coverage. Categories for coverage need to have a fair amount of flexibility to avoid the creation of "fake" news in order to meet standards. Also, the news/ed/ad mixture needs to be countered by the use of guidelines for categories of news issue topics. In the *1960 Programming Statement*, "news" is itself a category. Thus, the proposal for regulating televised news requires more specific kinds of content regulation than previously used.

123. General Fairness Doctrine Obligations, 49 Fed. Reg. 20,317 (May 19, 1984) (notice of inquiry); Fairness Doctrine Obligations, 102 F.C.C.2d 143, 157 (1986).

124. Syracuse Peace Council v. WTVH, 2 F.C.C.R. 5043, 5057 (1987).

The ascertainment policy and the first prong of the Fairness Doctrine (requiring broadcasters to find out what is newsworthy) promoted newsgathering. The need for the ascertainment policies and the Fairness Doctrine has probably evaporated with concerns over scarcity. The problem is no longer that there are not enough channels on which to present enough news, or that too many difficult choices need to be made. The problem is that there are too many incentives to fill news channel time with editorial opinion and advertising of news, rather than the fruits of newsgathering. The need to promote newsgathering within television, the "paramount public medium," has not changed.

Today there are more news outlets and more coverage, but the basic regulatory goal remains. There is still a need to push news outlets to find and report *news*. The challenge in past decades was to make sure that broadcasters did not replace or minimize news coverage for the sake of non-news items such as entertainment shows. The challenge now is to make sure that outlets beat back the thick brush of editorial programming and advertising of news and ensure that there are adequate vistas for the reporting of "pure" news on a sufficiently wide range of news issues.

C. *Minimizing the Risks of Governmental Censorship*

The most common criticism of the idea that the FCC should regulate televised news is that it will lead to government censorship. This is a weighty criticism. The deregulators of media, committed to this view, fostered a market in which news agencies compete vigorously. Some find that this results in a press that brings more news to more people. This is how it was supposed to work.

As I have argued here, one product of deregulation has been the trend toward the news/ed/ad mixture. Particularly with the growth of cable news networks, there is competition to fill 24-hour program schedules for news. Paradoxically, these vistas for news products have been filled with editorial and advertising products whose pull and popularity has had the effect of narrowing the scope of issues covered. With more channels filling more time, there is a new constellation of managerial choices for news outlets to make. These choices are made in highly competitive markets where viewers evince preferences whose sum is not always responsible or beneficial news coverage.

In this environment, the risk of managerial censorship is every bit as much of an ongoing risk as governmental censorship. That is, the managerial choices of the media outlets sometimes

have the effect of censorship when a network declines to air particular programs because they are, for example, lewd, politically objectionable, dull, or unprofitable. The news/ed/ad mixture confronts managers with profound temptations to censor. The effort to appeal to a particular demographic can provide reasons to pre-select news to fit editorial programs and advertisements, in an effort to attract or keep a group of viewers. Where a news outlet understands that its viewers are partisan, there are temptations to exclude views that will irk viewers. When revenues are considerable,[125] and thirty-six percent of viewers state that they watch a news channel to listen to views with which they agree, there are clear incentives to exclude particular views.[126] There are temptations to follow news of the rich and powerful to the exclusion of the poor and marginalized. Programming moves easily between commercial advertisements and news about those who have money to buy. As the wings of the companies that own news outlets span wider and wider, there is greater temptation to run stories on issues that concern "in house" enterprises.

The public's choice is *not* whether to suffer governmental censorship or not. The choice is between governmental regulation (with its risks of state censorship) or the outcomes of private competition (with its risks of managerial censorship). Some have tried to develop a theory of when the government is justified in limiting the effects of managerial censorship. For example, Owen Fiss has offered a theory that favors governmental limits on managerial autonomy where those limits can help citizens exercise their "democratic prerogative":

> Under the managerial censorship theory . . . [the autonomy of media organizations] is conceived as serving only instrumental purposes: it exists so that citizens may learn what they need to know to exercise their democratic prerogative properly. The theory recognizes that the exercise of managerial control can sometimes interfere with the achievement of this end. Thus, the desirability of media

125. The 24-hour networks have enjoyed sharp increases in the prices for ads in the past few years. *See* PEJ, *supra* note 1, at 19 (reporting that CNN earned $351 million in 2003, Fox earned $96 million, and MSNBC was projected to earn $3.1 million). Broadcast network news remains a "robust generator of revenues." *Id.* at 15 (reporting that NBC, CBS, and ABC took in $500 million in revenue in 2003, while morning news programs took in more than a billion dollars for those networks in 2002).

126. Pew Study, *supra* note 5, at 35.

> autonomy becomes entirely contingent upon how the media serves the informational needs of the public.[127]

Thus, the proper role of government includes using media outlets "instrumentally" in order to make sure that the public learns what it needs to learn. The special impact theory elaborated earlier, however it is ultimately refined, would harbor a view of why government regulation is justified in limiting managerial censorship, even at the risk of government censorship, that resonates with Fiss's argument.

There is certainly potential for government censorship in both the effort to partition the news/ed/ad mixture and to widen the scope of news issue coverage. The standards for keeping news distinct from editorial and advertising will be put in question. One person's news on events of environmental destruction is another's editorial. One person's misleading, sensationalist advertisement for news coverage of the war in Iraq is another's useful information about network coverage of the event.

The risks of government censorship in content regulation can be minimized by (1) ensuring that content standards are appropriately enforced by the FCC's licensing mechanism given by Congress to the FCC in the Communications Act of 1934; (2) learning from mistaken doctrines that were incommensurate with the licensing doctrine; and (3) making inventive use of voluntary cooperation between television outlets.

1. Renewed Commitment To License Renewal

The FCC has been very hesitant to use its "stick," the revocation of broadcaster licenses, in order to enforce public interest obligations. The few instances of refusal to renew have followed particular instances of misconduct, rather than a failure of a licensee to meet a set of content-based standards that are commensurate with the licensing scheme.[128] The length of licenses has grown too long, and their renewal too easy.

The public has an interest in avoiding frequent turnover of licensees, but the FCC has flexibility in how it may enforce public

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127. Fiss, *supra* note 6, at 1224. Fiss does not expressly advocate the special impact theory.

128. *See, e.g.*, Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964) (affirming refusal to renew license for misrepresentations in license renewal proceeding, but not for other issues, which included licensee's allocation of a substantial amount of programming to off-color remarks); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972) (upholding first FCC denial of license renewal for failure to comply with Fairness Doctrine).

interest obligations. It can use this flexibility to balance the interests of stability in programming with service interests in a wide scope of news issue coverage. The Telecommunications Act of 1996 extended television broadcast licenses from five to eight years.[129] At the end of this term, the FCC may grant renewal if the "public interest, convenience and necessity would be served thereby."[130] The renewal application is the size of a postcard and the process is not an occasion for serious consideration of whether public interest obligations have been fulfilled, and whether a licensee has a plan for improving in its service to the public interest.[131] The FCC possesses tools to change licensee behavior short of issuing the "death penalty" of license revocation.[132] The Commission may issue enforcement letters or "cease and desist" orders.[133] An attractive option for the FCC is its ability to grant licenses for a term shorter than eight years.[134] For example, rather than revoking a license, the FCC could grant it for one year, causing a licensee to focus its efforts.

Optimally, the FCC would develop an application process that reviews licensees' public obligations and pegs the length of their license to the FCC's concern over a licensee's unwillingness to serve the public.

2. A Turn Away from Pursuit of Discrete Violations

The public interest standard is used most effectively when the standards for license renewal are appropriate to the penalty of license renewal or abbreviation. The FCC should regulate for content so long as it finds a balance appropriate to the license renewal mechanism. In *Banzhaf*, the D.C. Circuit described this balance:

> [I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative

129. Telecommunications Act of 1996, Pub. L. No. 104–104, § 203, 110 Stat. 56, 112 (codified at 47 U.S.C. § 307(c)) (2000).

130. *Id.*

131. *See* 47 U.S.C. § 309(k)(1) (2000) (making license renewal contingent on whether applicant has (1) served the public interest; (2) committed no serious violations of the Communications Act or of FCC rules and regulations; and (3) not committed other violations of the Act or FCC rules and regulations that would constitute a "pattern of abuse").

132. *See* 47 U.S.C. § 312(a)(7) (2000) (permitting revocation of a license).

133. 47 U.S.C. § 312(b) (2000).

134. 47 U.S.C. § 307(c)(1) (2000).

> duties—e.g., to strike a balance between the various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made. In practice, the Commission rarely denies licenses for breaches of these duties. Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.[135]

The balance described here is appropriate: the FCC should impose only "general affirmative duties." Particularly with respect to content regulation, the FCC should seek standards that fit the real scheme of enforcement that it is prepared to use. It is likely improper to revoke a license for failure to meet strict quantitative measures for categories of programming, because of the tough problems of drawing those categories. A review of overall performance and good faith are appropriate, even for license terms of three or four years. Where good faith is not evident, the FCC may grant shorter "probationary" licenses to help enforce observance of content-based public interest obligations.

When the FCC turns away from regulations that are commensurate with the licensing mechanism, trouble usually follows. There are three examples that come to mind: the Fairness Doctrine, the distortion policy, and the policing of indecency and obscenity.

Recall that the Fairness Doctrine included two obligations. The first obligation was to cover important news. This obligation was enforced erratically.[136] It also had a circular quality to it. A problem became a problem because it was a problem: broadcasters were expected to cover events because they had the attention of community leaders, but they often had the attention of community leaders because they were newsworthy for broadcasters. Though this obligation was generally beneficial, many important but less controversial news issues were still neglected.

The *Cullman Doctrine*'s obligation to provide air time to individuals attacked by editorials had a similar limiting effect. The

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135. Banzhaf v. WTRF-TV, Inc., 405 F.2d 1082, 1095 (1968) (citations omitted).

136. Bill Chamberlin, *The FCC and the First Principle of the Fairness Doctrine: A History of Distortion and Neglect*, 31 FED. COMM. L.J. 361 (1979).

doctrine was only invoked where an issue had already gained the attention of newscasters, so this did little to extend coverage to issues of the poor and marginalized. Furthermore, the rule involved the FCC in enforcement of many discrete violations. Clever individuals or parties could exploit the rule.[137] Enforcement of the rule required the FCC to step into the middle of too many messy political disputes that it could not easily resolve through the sanction of loss of license.[138]

Another example of a policy that is incommensurate with the licensing mechanism is the FCC's policy on distortion or suppression of news.[139] The FCC has attempted, through its policy against distortion and suppression of news, to investigate broadcast news programs on the basis of viewer complaints of bias, and staging or rigging the news.[140] The effort has been largely fruitless.[141] The FCC has given the policy "extremely limited

137. The dispute that led to *Red Lion* involved a station that ran religious right broadcasts. After an on-air guest, Billy Hargis, gave a speech highly critical of a leftist journalist, the owner of the station refused to allow free access to the criticized journalist. The journalist in question, Fred Cook, wrote a book labeling Barry Goldwater, Johnson's opponent, an "extremist" on the right. Reportedly, the Democratic strategists launched Cook's work, sending copies of it to right wing radio stations. The plan was twofold. Either Cook's polemics would get exposure in key markets through the exercise of the Fairness Doctrine, or right wing radio stations would decline to carry programs critical of it, out of distaste for having to carry the other side. *See* FRED FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 38 (1975). In the early 1960s, the Democratic National Committee prepared kits explaining "how to demand time under the Fairness Doctrine" and handed them out at conferences. *Id.* at 35. Used to answer conservative critics in the lead-up to the election of President Johnson, the Democrats garnered 1,678 hours of free airtime. *Id.* at 39.

138. *See, e.g.*, Columbia Broad. Sys. v. Dem. Nat'l Comm., 412 U.S. 94 (1973).

139. Like the Fairness Doctrine, the distortion policy was born of the 1949's *Editorializing*: "A licensee would be abusing his position as a public trustee . . . were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news." Editorializing by Broad. Licensees, 13 F.C.C. Rep. 1246, 1246–47 (1949). In a case involving an erroneous claim by CBS in part of a documentary, the FCC remarked that "[r]igging or slanting the news is a most heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." *In re* Complaints Covering CBS Program "Hunger in America", 20 F.C.C.2d 143, 151 (1969).

140. Lili Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005 (2000); Chad Raphael, *The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL'Y 485 (2001).

141. Levi, *supra* note 140, at 1016 n.33; *see also* Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programing*, 3 J.L. & POL. 625 (1987) (arguing that even without direct legislation regulating broadcasts, Congress as a whole, in committees or individual

scope."[142] The Commission has rejected what it envisions to be a censor's role: "[I]n this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself."[143] The claim that a program has "slanted" or "rigged" the news has not been successfully extended to include the more general idea that the news is biased, or that news outlets systematically suppress issues. The Commission has given the least credence to arguments regarding overall programming suppression and bias.[144]

The distortion policy suffers from several problems. While the problem of slanting, rigging, or falsification of particular news items is outrageous, is it not a wise use of the FCC's powers and resources. Journalist ethics adequately address, in principle, the appropriate modes of conduct and even the underlying reasons for news distortion.[145] Because the distortion policy hovers so closely to individual ethics, the FCC has perhaps felt compelled to put in place prohibitively high threshold standards for complainants. Consequently, few cases are brought, and a negli-

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members can exert, via "lifted eyebrow" can abridge First Amendment liberties by considering broadcast regulations). The FCC has developed something like a four-part test for finding distortion. First, there must be an accusation of deliberate intent to distort the news or mislead the audience. The FCC will not meddle in legitimate editorial decisions of the broadcaster, only act against "deliberate distortion," rather than simply "mere inaccuracy or difference of opinion." Second, the complainant must be able to produce "substantial" or "significant" extrinsic evidence of such deliberate or knowing distortion. This must include either written or oral instructions from station management to fabricate or distort the news, evidence of a bribe, outtakes, written memoranda establishing rigging of news, or testimony from insiders. Third, the actor(s) doing the distortion must include licensee or top management or news management. Finally, the distortion must involve a significant matter, not trivial or incidental. *In re* Complaints Covering CBS Program "Hunger in America", 20 F.C.C.2d at 151.

142. Galloway v. FCC, 778 F.2d 16, 21 (D.C. Cir. 1985).

143. *In re* Complaints Covering CBS Program "Hunger in America", 20 F.C.C.2d at 143, 151.

144. *See* Levi, *supra* note 140, at 1026 n.81 (listing an extensive record of cases, many brought on behalf of minorities or women who contend that programming relevant to public issues particular to them has been suppressed, in which the plaintiffs failed to prove distortion or suppression).

145. *See, e.g.*, Society of Professional Journalists, Code of Ethics, *at* http://www.spj.org/ethics_code.asp (last visited Apr. 9, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The Society of Professional Journalists ("SPJ") states, "The SPJ Code of Ethics is voluntarily embraced by thousands of writers, editors and other news professionals. The present version of the code was adopted by the 1996 SPJ National Convention, after months of study and debate among the Society's members." *Id.*

gible number are heard by the Commission.[146] Distortion of news is one of the places where markets are likely to take care of most problems. Competitors in the news market are likely to police one another, eager to publicize gross inaccuracies or false reporting by one another.

Finally, the policing of indecency and obscenity is the FCC's most notable current effort to regulate for content across all television—broadcast, cable, and satellite. But, the policing of indecency and obscenity illustrates most clearly what happens when FCC policy ventures from the natural limits and purposes of the license mechanism. The policing of indecency and obscenity by the FCC appears—against the wider backdrop of doctrine—anomalous. The FCC's interest in such matters developed late. The Communications Act of 1934 did not contain direct sanctions against broadcasters who aired obscene or indecent programs. Fines levied by the FCC are so sporadic and minimal that they have little effect.[147] The fines levied by the FCC are incommensurate with the license renewal mechanism. Revoking a major network's license because of incidents of indecency or obscenity simply does not seem to fit. Violations so extensive that they might merit license revocation would seem better suited for the Justice Department and federal criminal codes.[148]

The regulation of televised news should avoid the pitfalls demonstrated by the FCC's efforts to use the Fairness Doctrine, to employ a distortion policy, and to police for indecency and obscenity. None of these are natural applications of the license renewal mechanism that Congress gave to the FCC. The FCC cannot reasonably revoke a television station's license for a single failure to provide air time for a fair response, or for a single incident of distortion. When it uses fines for enforcement, as it does in policing indecency and obscenity, the FCC risks becoming a moral tribunal. The public eye looks to the FCC whenever

146. Raphael, *supra* note 140, at 500 n.69, (citing BARRY G. COLE & MAL OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE 123 (1978)). From 1969–72, the Commission found no distortion in thirty-four cases, and distortion in one. From 1973–76, it found no distortion in forty-three cases, and distortion in five. From 1969–99, the FCC took only 120 cases, but found distortion in only on twelve. Raphael, *supra* note 140, at 502.

147. Fines currently stand at $32,500 per violation. Congress is considering increasing fines to as much as $500,000 per violation. Similar legislation failed in the previous Congress. Todd Shields, *Congress Moves to Hike Indecency Fines*, ADWEEK, Jan. 26, 2005, *available at* http://www.adweek .com/aw/national/article_display.jsp?vnu_content_id=1000778208 (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

148. *See* 18 U.S.C. §§ 1464–1465 (2000) (criminalizing obscenity); *see also id.* § 2251 (2000) (criminalizing child pornography).

breasts are exposed on television or a radio shock-jock behaves badly. Congress gives new orders whenever there is a new pressure to protect the children from cussing and dirty movies. Likewise, in pursuing "unfair" editorial practices or incidents of distortion, the FCC risks stepping into perennial debates over "media bias." With respect to news coverage, the FCC should focus its efforts on the problem of scope of coverage and promote general standards that are fitting for the use of the license renewal mechanism, rather than fines.

3. Voluntary Cooperation Between Televised News Outlets

The effort to develop general standards for content regulation of televised news can be considerably enhanced by the voluntary participation of televised news outlets. The Gore Commission relied heavily on voluntary cooperation between digital broadcasters as the way to promote public interest obligations. The more that is done voluntarily, the fewer risks of government censorship are afoot.

Both proposals that I have offered are amenable to development by voluntary means. In partitioning the news/ed/ad mixture, it would be useful for the televised news outlets to assist in developing ways to keep news and editorial apart and clearly marked. Also, the outlets could reach agreements on standards for the reduction of, and change in, style of advertising. While not an ideal model, the networks were able voluntarily to pass content ratings for non-news programming. They may be able to do something similar with respect to news coverage. The development of categories for news issue coverage is likely to be highly contentious, and voluntary development of the lists of categories and policy for implementation would be a boon.

The FCC should consider inventive ways to answer the hard questions about what constitutes news, what the essential categories of news are, and what kind of news reporting is appropriate for particular news items. Outside of the regulatory context, Geoffrey Cowan, dean of the University of Southern California's Annenberg School for Communication, has offered a stimulating proposal that could be put to use here.[149] Cowan has suggested that media should be judged by an implicit contract they have with viewers about the level of accuracy in what they present. For example, those who watch gossip-based entertainment shows do not expect that every detail is truth. Likewise, viewers of a docudrama might expect a certain measure of license to be taken with

149. Geoffrey Cowan, *The Legal and Ethical Limitations of Factual Misrepresentation*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 155 (1998).

characters—but not too much. By contrast, viewers of business news programs will expect extremely accurate reporting. This idea could be put to use in the regulation of television news, by using the contract model to help figure out what "news" is, in contrast to editorial or advertising. Also, the contract model could be used to help determine what standards of reporting are appropriate for different kinds of news formats.

The FCC could also consider reinvigorating independent news councils as clearinghouses for voluntary cooperation.[150]

150. In the 1960s and '70s, several state councils were established, and in 1973, the brightest star of success, the National News Council ("NNC"), was launched. It lasted only until 1984. The NNC emerged from the initiative of the Twentieth Century Fund. *See generally* PATRICK BROGAN, SPIKED: THE SHORT LIFE AND DEATH OF THE NATIONAL NEWS COUNCIL (1985). The Twentieth Century Fund still exists as an organization based in New York City. It aspires to "educate, provoke and develop better answers when evidence and reason show that public debates are badly off track." *Id.* at 6. The NNC consisted of fifteen members representing both the public and the media. It considered complaints against national newspapers, news agencies, magazines, and television networks. Complainants would waive their right to use any of the council's proceedings as evidence in court. *Id.* The NNC staff analyzed complaints and made initial judgments about their merit. If a complaint was found to have merit, it was sent to a grievance committee composed of members of the Council, which in turn, made recommendations to the full Council. The Council judged the cases and issued verdicts. Over the decade of its existence, the NNC dealt with 227 complaints. *Id.* at 38. While its decisions were made public, they were not widely reported. It had no power of enforcement, but relied on publicity to encourage the press to mend its ways. Brogan found that "[d]espite all its good intentions and ten years of strenuous endeavor, the council was spurned by the press and neglected by the public. Without press or public support, it could win no publicity. Without that, it could not raise the money it needed to carry on operations—and earn the support of press or public." *Id.* at 7.

The NNC never successfully gained the support of most of the press. Many declined to cooperate with the Council, and it never received contributions from the press industry. This lack of funding was devastating, since to do its job effectively, the Council had, effectively, to re-report a story, expending considerable resources, including experienced journalists. Perhaps the NNC and other press councils were too ambitious in their aspiration to reign in press industry and undertake extensive reviews of complaints. In my model, the complaint procedure would be used, but it would not be central. Rather, the focus of the news Council would rest in articulating and publishing standards for different varieties of news reporting. Ideally, the Council might arrive at a list of standards by which it could issue evaluations of news agencies. By gaining merit or demerits, a news agency can change its rating over time. Complaints could be received, reviewed, and depending on resources, pursued in order to gain insight into standard-making. The Council should try to seek experienced journalists and television industry executives who are willing to make a commitment to independence.

An example of one of the few surviving press councils in the United States is the Minnesota News Council, *at* http://www.news-council.org/main.html

While in the past independent news councils served more of a litigation-centered role, they could take the lead (with FCC encouragement) in adopting standards for the partition of the news/ed/ad mixture, and in adopting categories for news coverage. Televised news providers could form agreements to accept these standards as recommendations, and this acceptance could count toward a good faith showing of compliance with FCC standards.

As important as it is to explore efforts at voluntary cooperation, however, the FCC should be ready to reject voluntarily derived standards if they are inadequate. There is a very real possibility that the outlets could "capture" the voluntary process. On the other hand, too much command-and-control content regulation could raise expenses for outlets such that it will drive them out of the news business, a worse alternative.

To be clear—I think *whether* televised news should be regulated or not is a false question. The two proposals offered here—the partition of the news/ed/ad mixture and the use of category-based standards for news coverage—both present real opportunities to censor. But, as a result of deregulation, televised news outlets compete in expanding and competitive markets, and this competition also provides numerous inducements for news outlet managers to censor. It is necessary to balance these interests. To the extent that the FCC sets general, affirmative, good-faith guidelines that are commensurate with enforcement through the license renewal mechanism (rather than fines or litigation of discrete instances), the risk of government censorship is minimized. By seizing on opportunities—perhaps the voluntary agreement of news outlets to accept content standards developed through independent news agencies—the risk can be further reduced. With these reduced risks of censorship, the potential benefit of rescuing televised news from the managerial censorship inherent to the news/ed/ad mixture outweighs the dangers of government censorship.

The regulation of televised news, in sum, would require the FCC to reconsider several fundamental issues. This is a time of change both for television and news media. The television medium is changing with the transition to digital technology. The news media is changing with the multiplicity of news media, particularly the Internet, shifting techniques, and standards for reporting.[151] The rise of cable news channels and the phenom-

(last visited Apr. 9, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

151. *See generally* PEJ, *supra* note 1; Pew Study, *supra* note 5.

ena I have described here as the news/ed/ad mixture manifest the ways in which these changes overlap. Unfortunately, these developments in televised news coverage have been a blind spot for the FCC.

Shortly, it may not be possible to apply public interest standards to news carried over cable or satellite. As discussed earlier, the FCC has only regulated the content of cable television for indecency and obscenity. Outside of this area, the FCC has barely been able to catch cable and satellite by the tail, by imposing general public interest obligations on cable and satellite carriers, rather than providers of the news channels themselves. The Supreme Court has held the door open with respect to this regulation of cable and satellite carriers,[152] though it has rejected the applicability of the scarcity theory to cable.[153] The rapid pace of technological change makes some members hesi-

152. After initial hesitation, the FCC asserted jurisdiction over cable in 1962. *See* Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962).

153. The 1992 Cable Act re-imposed "must carry" rules requiring the carriage of local broadcast stations or the compensation of broadcast stations for retransmission of their programming. In *Turner Broadcasting v. FCC*, the Supreme Court put to rest the idea that the scarcity doctrine applied to cable television. Turner Broadcasting, Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I") (refusing to extend *Red Lion* to cable television). The Court rejected the argument that "market failure" could be the basis for government regulation of broadcasting. It is only the "special physical characteristics of broadcast transmission" that underlie the Court's broadcast jurisprudence. *Id.* at 640. Having determined that the scarcity doctrine provided no basis for the application of must-carry rules, the Court applied traditional First Amendment categories in finding that must-carry rules were content-neutral. Justice Kennedy, writing for the Court, reasoned:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming . . . .

Id. at 656. The First Amendment does not forbid government from taking steps to make sure that "private interests not restrict, through physical control of a critical pathway of communication, free flow of information and ideas." *Id.* at 657.

The only thing that the courts have made clear so far with respect to cable and satellite content regulation is that it will not be grounded in the scarcity doctrine. *Turner* applied the Court's traditional analysis for content-based regulations to determine whether there is compelling governmental interest and that a regulation is narrowly tailored. While Kennedy's analysis would seem to open the door for an analysis of managerial censorship by stressing the gatekeeper function of cable operators, he was careful to stress that it is the *physical* role of censor that is implicated, not editorial censorship.

tate to set any rules in stone.[154] The Gore Commission called for a renewed commitment to the promotion of the public interest standard for the new age of digital broadcasting,[155] but it gave no special attention to the problem of televised news and pre-dated the rise of the 24-hour news channels.[156] If the FCC does not develop standards for televised news coverage across all television media, it will lose a valuable chance to protect "the public interest" in communications, with which it has been entrusted.

We are still in the era of deregulation. The FCC's philosophy of regulation under the public interest standard has changed before, however, and it can change again.[157] Congress has displayed a continued commitment to the standard.[158] The recent Commission has been divided along partisan lines in its enthusiasm for finding new ways to employ the public interest standard.[159] Especially under Chairman Powell, the FCC exercised

154. In *Denver Area*, the Court ruled on the validity of portions of the 1992 Cable Act that permitted cable operators to enforce indecency standards. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996). The Court issued a plurality opinion, in which the Justices differed sharply over whether the First Amendment permitted editorial discretion by cable providers to air indecent material. Importantly, the opinions made it clear that the Court had not reached any decision on how to apply public interest standards to cable. Justice Breyer, whose opinion controlled the outcome of the case, found that it was due to the "changes taking place in the law, the technology, and the industrial structure related to telecommunications" that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes." *Id.* at 741–42. He drew on the pervasive presence argument of *Pacifica* to uphold federal law that permitted a cable operator to enforce a prospective ban on indecent material. *Id.* at 743. Justice Souter also stressed that the law "all of the relevant characteristics of cable are presently in a state of technological and regulatory flux . . . we should be shy about saying the final word today." *Id.* at 776 (Souter, J., concurring). In dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, had no doubts. They would have preferred that the court give cable the same full protections as the print media. *Id.* at 813–14. (Thomas, J., dissenting).

155. *See* Gore Commission Report, *supra* note 50, at 46.

156. *See supra* note 52.

157. *See* Ervin S. Duggan, *Congressman Tauzin's Interesting Idea*, BROAD. & CABLE, Oct. 20, 1997, at S18 (former FCC Chairman noting that "successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it"); *see also* Pinellas Broad. Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir. 1956) ("[T]he Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes.").

158. *See, e.g.*, Telecommunications Act of 1996, *passim*, Pub. L. No. 104-104, 110 Stat. 56 (making over 40 references to the public interest standard).

159. The current FCC also reflects political divisions with respect to the public interest standard. The Commission currently has three Commissioners

content regulation primarily in the policing of indecency and obscenity. The problem of televised news raises a moral challenge: Is the quality and scope of news coverage important enough to justify a repudiation of at least some of the deregulatory angst over content regulation? It also raises a legal challenge: Will the FCC be bold enough to unhook its policies from the scarcity rationale, and consider a theory, such as some form of special impact theory, that would sustain content regulation across broadcast, cable, and satellite media? The answers to these questions will tell us much about what is left of the public interest standard.

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with Republican affiliations (Chairman Powell, Abernathy and Martin), and two Commissioners with Democratic affiliations (Adelstein and Copp). Only the Commissioners with Democratic affiliations consistently give attention to the vitality of the public interest standard. In his statement on the FCC's second period review of its rules on conversion to digital television, Commissioner Adelstein remarked that "I am puzzled why we have not yet provided broadcasters and the public with a concrete understanding of broadcasters' public interest obligations in the digital age." Separate Statement of Commissioner Jonathan S. Adelstein, Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order (Aug. 3, 2004), *available at* http://hraunfoss.fcc.gov/ edocs_public/attachmatch/DOC-250542A5.doc (on file with the Notre Dame Journal of Law, Ethics & Public Policy). He also stated, "Multicasting and other new horizons in digital broadcasting should correspond to new horizons in serving the public interest." *Id.* Commissioner Copps, while also approving the Rules on digital transition, noted:

> The vast majority of television stations are already beginning to broadcast in digital and hundreds of stations across the country are multicasting. And yet, those broadcasters do not know what they must do to discharge their public interest obligations on their new channels. Worse, viewers are equally in the dark. We really can't delay any longer in bringing some certainty for both broadcasters and the public.

Statement of Commissioner Michael J. Copps, Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television (Aug. 4, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-250542A3.doc (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The same emphasis on the need to specify public interest standards was not found in the statements of the Republican Commissioners. Commissioner Abernathy, for example, describes her "regulatory philosophy" as focused on "harnessing the benefits of market-based solutions rather than relying on prescriptive regulation." Kathleen Q. Abernathy, Guiding Principles for the Age of Convergence, Address at the FBCA Annual Meeting (June 24, 2004). Commissioner Powell quipped, "The night after I was sworn in, I waited for a visit from the angel of the public interest. I waited all night, but she did not come." Michael K. Powell, The Public Interest Standard: A New Regulator's Search for Enlightenment, Address Before the American Bar Association 17th Annual Legal Forum on Communication Law (Apr. 5, 1998), *available at* http://www.fcc.gov/Speeches/Powell/spmkp 806.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

CONCLUSION

Televised news has a tremendous capacity to shape public views of important matters. Done well, televised news exposes the public to a wide range of issues in as non-partisan a manner as possible. The trend in televised news, propelled by 24-hour news channels, is toward a mixture of news, editorial programming, and advertising of those news and editorial items. The effect of this news/ed/ad mixture is constriction in the scope and quality of news coverage.

The regulation of televised news will require a new season for the FCC's use of the public interest standard. The FCC must unhook public interest regulation from the scarcity doctrine. The FCC should regulate televised news—in its broadcast, cable, and satellite forms—on the basis of the special impact of televised news on viewers in a democracy. FCC regulation is also needed to minimize managerial censorship. The news/ed/ad mixture magnifies the effects of managerial censorship of news coverage, and the impact of such censorship on viewers. Two proposals can help curb the dangers of managerial censorship by outlets: (1) the partition of the news/ed/ad mixture; and (2) category-based standards for news issue coverage. While these proposals involve content regulation, the risks of government censorship they pose are less severe than the risks of managerial censorship manifest in the news/ed/ad mixture. Prior to deregulation, the FCC used programming content categories to help evaluate licenses; it did so without abuse. The FCC also has long limited the effects of editorial and advertising in television. License renewal policies that require good faith performance in meeting standards for televised news coverage are appropriate and enable the FCC to promote the best uses of televised news with minimal potential for censorship.